SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 428

THE UNITED STATES OF AMERICA
APPELLANT

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, WASHINGTON REAL ESTATE BOARD, HERBERT U. NELSON, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Record from U. S. D. C., District of Columbia	1	1
CRIMINAL ACTION NO. 950-47		
Reporter's transcripts of proceedings	1	1
Caption and appearances	1	1
Colloquy between Court and counsel	4	1
Jury empanelled	28	5
Opening statement on behalf of National Association of Real Estate Boards (By Mr. Whiteford)	39	6
Opening statement on behalf of Washington Real Estate Board (By Mr. Leahy)	51	12
Testimony of RUSH, Charles J.		
(By Mr. Kramer)	80	29
(By Mr. Leahy)	185	86
(By Mr. Whiteford)	261	126
(By Mr. Kramer)	264	128
(By Mr. Leahy)	281	137
BAKER, Lowell		
(By Mr. Kelly)	286	140
(By Mr. Whiteford)	302	148
(By Mr. Kelly)	303	149
NELSON, Herbert U.		
(By Mr. Kramer)	304	149
BAKER, Lowell (Recalled)		
(By Mr. Kramer)	382	192
Colloquy between Court and counsel	387	193

	Original	Print
Testimony of NELSON, Herbert U. (resumed)		
(By Mr. Kramer)	412	206
(By Mr. Whiteford)	417	209
(By Mr. Leahy)	438	220
(By Mr. Kramer)	447	225
(By Mr. Leahy)	454	229
(By Mr. Kramer)	461	233
TODD, Leon		
(By Mr. Kelly)	466	235
(By Mr. Whiteford)	478	241
(By Mr. Kelly)	481	243
JONES, Carrie Maude		
(By Mr. Kelly)	484	244
(By Mr. Whiteford)	493	249
BEITZELL, John Garrett		
(By Mr. Maletz)	495	250
(By Mr. Leahy)	514	261
(By Mr. Maletz)	531	270
BUCHANAN, J. Wesley		
(By Mr. Maletz)	538	273
(By Mr. Leahy)	550	279
(By Mr. Maletz)	576	293
RUGERS, Paul E.		
(By Mr. Kelly)	582	295
Colloquy between Court and counsel	588	298
Argument on motion for judgment of acquittal on behalf of National Association (By Mr. Whiteford)	597	304
Argument on motion (in reply) (By Mr. Kramer)	628	304
Argument on motion for judgment of acquittal on behalf of the Washington Real Estate Board (By Mr. Leahy)	631	305
Colloquy between Court and counsel	723	305
Opinion of Court, Curran, J.	766	306
Reporter's certificate [omitted in printing]	773	310
File jacket	774	311
Presentment	776	312
Indictment	777	313
Praecipe entering appearance of Roger J. Whiteford and John J. Wilson for defendant, National Association of Real Estate Boards	786	320
Praecipe entering appearance of William E. Leahy for defendant The Washington Real Estate Board	787	320
Stipulation of authenticity and genuineness and for use of copies of documents	820	320
Exhibit "A" therewith—List of documents	822	322
Stipulation of authenticity and genuineness and for use of copies of documents	824	324
Exhibit "A" therewith—List of documents	826	325
Stipulation as to certain facts	832	325
Motion of defendant National Association of Real Estate Boards for judgment of acquittal	872	326
Minute entry *re* granting of defendant's motion for judgment of acquittal, and discharge of jury	874	327

CIVIL ACTION NO. 3472-47

	Original	Print
Reporter's transcripts of proceedings	1001	328
Colloquy between Court and counsel	1021	328
Colloquy *re* stipulations as to submission of case on record made in Criminal Action No. 950-47	1094	330
Caption and appearances	1102	333
Colloquy between Court and counsel	1104	334
Argument on behalf of National Association of Real Estate Boards and Herbert U. Nelson	1160	337
Argument on behalf of Washington Real Estate Board and individual defendants other than Herbert U. Nelson	1173	343
Closing argument on behalf of the plaintiff	1193	346
Colloquy *re* proposed findings	1212	348
Colloquy *re* record on appeal	1227	354
Reporter's certificate [omitted in printing]	1244	364
Complaint	1246	364
Answer of National Association of Real Estate Boards and Herbert U. Nelson	1264	373
Answer of J. Hawley Smith	1277	383
Joint and several answer of other remaining defendants	1278	384
Motion of plaintiff for judgment on the pleadings	1288	395
Memorandum of defendants National Association of Real Estate Boards and Herbert U. Nelson in opposition to motion for judgment	1289	395
Answer of remaining defendants to motion for judgment	1310	411
Informal memorandum by Judge Letts	1313	413
Order overruling motion for judgment on the pleadings	1314	413
Answer of defendant National Association of Real Estate Boards to motion for advancement	1318	414
Affidavit in support thereof	1321	416
Supplemental answer of the National Association of Real Estate Boards and Herbert U. Nelson	1327	417
Motion of defendants the National Association of Real Estate Boards and Herbert U. Nelson for summary judgment	1347	420
Supplemental answer of the Washington Real Estate Board, *et al.*	1348	420
Order overruling motion for advancement	1380	424
Motion of Washington Real Estate Board, *et al.* for summary judgment	1381	425
Order denying motions for summary judgment	1402	425
Mandate of the United States Court of Appeals dismissing appeal	1422	426
Stipulation *re* submission of cause on record made in Criminal Action No. 950-47	1426	428
Plaintiff's proposed findings of fact	1429	428
Court's findings of fact and conclusions of law	1435	433
Judgment for defendants	1439	436
Opinion by Judge Holtzoff	1440	437

	Original	Print
Petition of plaintiff for appeal	1446	440
Order allowing appeal	1447	441
Assignment of errors and prayer for reversal	1448	442
Citation	1451	444
Request of plaintiff to transmit original documents	1464	445
Praecipe for transcript of record	1465	445
Order to certify and transmit original documents	1469	448
Counterpraecipe for transcript of record	1470	449
Motion of defendants to set aside or modify the order to certify and transmit documents	1472	450
Statement by Judge Goldsborough concerning designation of record	1474	452
Order modifying order to certify and transmit original documents	1475	453
Clerk's certificate	1481	454

GOVERNMENT'S EXHIBITS

No.	Description	Date		
1	Roster of Washington Real Estate Board	Feb. 1947	1482	454
2	List of New Members and Changes in Roster	Undated	1486	460
3	Constitution and By-Laws of Washington Real Estate Board	7/22/41	1487	461
4	List of Officers and Directors, Washington Board	1940-47	1498	474
5	Code of Ethics of Washington Real Estate Board	4/30/43	1500	477
6	Code of Ethics of National Association of Real Estate Boards	Undated	1506	481
7	Constitution and By-Laws of NAREB	Undated	1508	486
8	List of members of Washington Real Estate Board entitled "All realtors are real estate men . . . *but* not all real estate men are realtors . . ."	Undated	1532-A	507
9	Application for Membership in Washington Real Estate Board, Inc.	Undated	1533	510
10	Application for Active Membership in Washington Real Estate Board—record of applicant F. M. Pratt Company, Inc.	1/17	1537	514
11	Application for Active Membership in Washington Real Estate Board—record of applicant, Walker & Dunlop, Inc.	3/16/38	1539	517
12	Memorandum of Special Commission. Study Committee held in the offices of the Board on Friday, February 10th, 1939, at 10:00 A. M.		1540	518
13	Map showing commission zones of Washington Real Estate Board	10/1/34	1542	520
15	Minutes of a meeting of the Board of Directors of Washington Board	5/17/39	1545	521

No.	Description	Date	Original	Print
16	Progress Report of Committee on Rates, Rules, and Customs of NAREB	Undated	1548	524
17	Letter from Boyd T. Barnard of NAREB to Chas. J. Rush, WREB	6/16/41	1560	536
17a	Guide on Rates, Rules and Customs of NAREB	Undated	1561	537
18	Minutes of meeting of Board of Directors of Washington Board	1/20/43	1574	546
19	Memorandum to All Active Members from Chas. J. Rush of WREB	1/22/43	1577	549
20	Minutes of Special Meeting of WREB held in Ambassador Hotel	2/16/43	1579	552
21	Special Bulletin of Washington Board by Chas. J. Rush	2/17/43	1582	555
22	Special Notice to All Active Members by Francis A. Murray of Washington Board	7/7/44	1383	556
23	Special Notice to Active Members by Chas. J. Rush attaching schedule of commissions and fees adopted by Washington Board	12/5/44	1585	559
24	Special Notice to Active Members by Chas. J. Rush	12/20/44	1590	566
25	Schedule of Commissions of Washington Board	12/19/44	1592	569
26	Sales Contract for Washington Real Estate Board		1600	575
27	Memorandum of meeting of Commission Study Committee	5/10/39	1601	577
28	Schedule of Commissions of Washington Board	2/16/43	1602	578
29	Letter from HUN, Secretary, to Joseph Laronge	2/28/35	1608	582
30	Letter from HUN, Secretary of NAREB, to Morton J. Luchs	9/4/35	1610	584
31	Report on Association's Activities by the Secretary	Jan. 1936	1611	585
32	Order of business—Board of Directors' Meeting NAREB	11/17/36	1618	588
33	Minutes of Meeting of Board of Directors NAREB	5/13/37	1625	590
34	Program of Activities and Budget for 1938—NAREB		1635	594
35	Report of the Executive Vice President, NAREB	Jan. 1938	1649	596
36	Report of the Executive Vice President, NAREB	Jan. 1939	1655	599
37	Minutes of Meeting of Board of Directors—NAREB	5/6/39	1662	602
38	Report of the Executive Vice President, NAREB	May 1939	1678	605

No.	Description	Date	Original	Print
40	Report of the Executive Vice President, NAREB	Oct. 1939	1686	607
42	Report of the Executive Vice President, NAREB	May 1940	1696	611
43	Report of the Executive Vice President, NAREB	Jan. 1942	1704	614
48	Letter from Herb Nelson of NAREB to A. R. Saunders	2/27/46	1717	617
49	Letter fom Nathan William MacChesney to Lon Forbush of Seattle Real Estate Board	6/26/46	1718	618
51	Letter from Leon E. Todd to Realtor Daniel F. Sheehan	3/20/46	1721	620
53	Report (1946-1947) Real Estate Commission of the District of Columbia	12/31/47	1724	621

Statement of points to be relied upon and designation of parts of record to be printed	1728	624
Counterdesignation of additional parts of record to be printed	1737	627
Order noting probable jurisdiction	1741	629

1 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950-47

UNITED STATES OF AMERICA
PLAINTIFF

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and
WASHINGTON REAL ESTATE BOARD
DEFENDANTS

Reporter's Transcripts of Proceedings

Washington, D. C.
Monday, May 24, 1948

The above entitled action came on for trial before the Honorable EDWARD M. CURRAN, Associate Justice, and a Jury, at 10 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor H. Kramer,
Trial Attorney.

Joseph P. Kelly, Jr.,
Herbert N. Maletz,
C. Heyward Belser,
Attorneys, Department of Justice.

2 On behalf of the National Association of Real Estate Boards:
Roger J. Whiteford,
John J. Wilson and
Jo V. Morgan, Jr.

On behalf of the Washington Real Estate Board:
William E. Leahy,
William J. Hughes, Jr.

PROCEEDINGS

The CLERK: United States v. National Association of Real Estate Boards and Washington Real Estate Board.

4 *Colloquy*

* * *

12 The COURT: Have you gentlemen considered settling this case?

Mr. KRAMER: I have been spending most of my time for nine months considering it. Judge Pine once again questioned the Government and counsel for the other side

with respect to settlement, and I told the Judge I had spoken about this case to the Attorney General and with his assistant, Mr. Ford, and the Government is willing to consider any offer of settlement that does not require a dismissal. It cannot and will not dismiss a criminal case against the defendant when we believe they are guilty.

The COURT: There is a civil suit filed for an injunction against the board and its members, is that correct?

Mr. KRAMER: That is correct.

Mr. WILSON: We have indicated a willingness to enter into a consent decree in that case if the criminal case should be dropped.

Mr. HUGHES: And so has the Washington Board, your Honor.

In other words, we will enter a consent decree enjoining any price fixing or any effort to fix or any trading back and forth, but they cannot plead *nolo contendere*.

The COURT: Who can't plead it?

Mr. WILSON: They won't do it.

The COURT: Our clients.

The COURT: Oh, I see.

13 Mr. HUGHES: We have consulted other counsel, your Honor, and we feel there is a stigma attached to it.

Mr. WILSON: For our client, it was submitted to the National Convention last fall, and Mr. Whiteford went out to San Francisco and they wouldn't do it.

The COURT: I should think it might be a good disposition.

Mr. WILSON: I should add I think a consent decree could give the Government more than they can get in a criminal case, because as Judge Pine told them a few months ago, nobody can go to jail in this case but the lawyers, for contempt.

The COURT: Of course, I can't compel them to dismiss the case. You say you have taken it up with the Attorney General?

Mr. KRAMER: Oh, yes. It has been a matter of some moment to the Department.

The COURT: Even though they consent to an injunction—of course you are pretty satisfied you can make this case, then?

Mr. KRAMER: Oh, yes, of course we are satisfied of that, your Honor, but the impression I am trying to give is that the matter is out of my hands. I have been called up and discussed it thoroughly and it is a matter of policy.

Mr. WILSON: If your Honor please, I don't think the record reflects your action on our challenge of the Government jurors.

14 THE COURT: Your motion to disqualify Government employees is denied.

Mr. WILSON: That is for both Boards?

The COURT: Yes.

Mr. WILSON: Secondly, we object to Question No. 9 being asked on the *voir dire*.

The COURT: Yes, I will exclude that.

Mr. WILSON: I don't know how my associates feel, if it were amended to say "against convicting or acquitting."

The COURT: I will leave out both.

Mr. WILSON: Have you anything you care to add?

Mr. WHITEFORD: Merely to say it has been the position of the National Association since the beginning that they do not intend to do anything toward price fixing; they never understood they were doing it.

The only real complaint, from our standpoint, they say is Article 9 of the Code of Ethics, which is a nationwide code for everybody, but we say in that Code of Ethics that the rates, fees and charges fixed by local boards are fair and reasonable and should be adhered to, and have been adhered to, it is our position, a d that the public should not be met with commissions from both sides; it is a code of ethics and it involves fair dealings from the industry everywhere, and it was written in behalf of the public. It has no price fixing significance, and whatever any local board wanted to

15 do with its rates, fees and charges, and we disclaim and have from the beginning any intention to do anything toward price fixing, and each individual member has authorized, since this indictment was first brought, to agree to any injunction that would say to the court, to the District of Columbia because we are involved here, that Section 9 of the Code of Ethics has no application to the District of Columbia, or for that matter we disclaim any price fixing intent over all the United States, and that has always been our position, and had anybody made a complaint about this, had the Government said anything about this it would have been corrected in 24 hours, even though we wouldn't agree with it.

I do hate to go into a long trial for more of a trivial thing, because in our discussion about it I think the Department is not too insistent that they want a pound of flesh, from the criminal side. But our folks just will not plead guilty to something that is a pure matter of principle, nor do they

feel like filing a *nolo contendere*, because if the Court did accept that *nolo contendere* and should impose even a nominal fine it is equivalent to a conviction to 40,000 of these National Association members all over the United States, and they just feel they can't do that, but they are perfectly willing to go further I think than the Government even is entitled to have them go in the matter of an injunction.

Of course the District of Columbia is the only jurisdiction in which this question could be raised because it is not interstate, obviously brokerage isn't, so this is the only place where it can be brought so far as the National Association is concerned, and that has been our position all along.

To tie up the Court for two or three weeks here, it is quite unnecessary.

The COURT: Of course it is a question of wisdom of the plaintiff's counsel. If you want to get your injunction out and stop something which you think should not be done, you will get it by your injunction, but I don't see that a criminal prosecution against an incorporated body, which is a separate legal entity, with individuals not involved in it at all—I don't know who has been advising the Attorney General on it but it sounds very silly to me.

Mr. KRAMER: Your Honor's feeling would be the same—

The COURT: You want to accomplish something. You are not going to accomplish anything by getting a conviction against the corporation, of course. All I can do is to fine them.

Mr. KRAMER: I think the same thing would apply to any criminal action.

The COURT: No, the same thing would not apply to any criminal action. How many criminal actions do you have against corporations?

Mr. KRAMER: All you get against an individual is a fine and usually he is a very wealthy person anyway.

The COURT: Oh, no, most of them get a jail sentence.

Mr. KRAMER: Oh, I mean in an anti-trust case.

Mr. LEAHY: You are not inferring the Real Estate Board is wealthy? I haven't received five cents yet.

The COURT: No. I mean it was approaching a problem from what I thought was a practical viewpoint.

You allege certain acts have been done by two boards. One suit is pending against both of the boards, which is a criminal suit, and the other suit is pending against the boards and individuals who go to make up the board.

Counsel are willing to consent to a permanent injunction which stops what they have been doing, which they say they didn't know as a violation but which you contend was. If that is accepted, I am trying from a practical viewpoint to find out what good is this against the corporation?

Mr. KRAMER: I think the very reason they don't want to plead *nolo contendere* shows there is an advantage to be gained—

The COURT: Don't you think they make an admission if they consent to the injunction?

Mr. KRAMER: No, sir.

The COURT: Very well.

Mr. WILSON: You know there have been cases where the Department has done just this.

Mr. WHITEFORD: They dismissed the indictment
18 in the Borden Milk Case.

Mr. WILSON: Moreover this is a practice, the one that has been complained of, that has been going on 25 or 30 years.

Mr. LEAHY: It has been going on longer than that.

The COURT: There is nothing I can do.

Mr. WILSON: Your Honor, to save at least one trip to the bench, may both of the defendants preserve the point that when a Government employee is called to the box it will be understood that we would challenge that juror and that the Court would deny the challenge for cause?

The COURT: Yes.

Mr. WILSON: Thank you.

• • •

28 JURY EMPANELLED

(Thereupon the following jurors were sworn to try the case:)

1. Edward T. Bowman	7. Mary O'Connor Iverson
2. Claude M. Wood	8. DeLano L. Robey
3. Harry Cohen	9. Carolee S. Johnson
29 4. Edwin C. Gasque	10. Zanesville Marshall
5. Evelyn D. Zittrauer	11. Sarah C. Moore
6. Mary E. B. Etcher	12. Charles W. Thomas

The MARSHAL: The Court stands recessed for ten minutes.

• • •

Opening Statement on Behalf of the Defendant National Association of Real Estate Boards

By Roger J. Whiteford.

* * *

It is a group of real estate men who are here in Washington and they and their board became members of the National Association of Real Estate Boards and they have boards in all of the States of the Union and in Hawaii, as well. The local board consists of about 250 real estate men. We will show you there are approximately 1,900 real estate men licensed in the District of Columbia to engage in the real estate business. There are, in the National Association, 980-odd boards of the character of the one in Washington, except that they are not as large and, all told, they have a membership of about 40,000 people over the United States. Although there are in the real estate business throughout the United States approximately 250,000 brokers and salesmen, real estate men, real estate agents, as you and I know them.

It is charged in this instrument called the indictment, the Government says, "Why, this little group of 250 people in Washington in this Board have conspired and combined with the National Association"—another trade association, which too represents such a small fraction of the total number of men, and women too, for there are many women real estate brokers who are members of the National Association—"they have conspired to control, to dominate and to prevent competition among the real estate men in the District of Columbia. Dominating the real estate industry, they fix the prices; they control the manner in which real estate operations are charged for in the District of Columbia."

How do they say we have done that? They say that we are doing that in violation of the Sherman Act. Ladies and gentlemen, that Act, as I remember it, was passed somewhere around 1890 or '92, '3 or '4. It was amended in 1914 or '15. We shall show you that it has been understood for years and years and years upon years that there was in Washington, in the District of Columbia and in the adjoining areas of Maryland, generally a general accepted understanding or going rate among real estate brokers for the sale of real estate, the trading of real estate, the performance of their duties as real estate men. Those schedules were subject to being printed, and they were distributed by the thousands for 30 or 40 years in the

District of Columbia and yet it was not until the 27th day of last August that the Government came in to complain about this action.

Let us explore just how it is that they try to drag the National Association into this transaction. They say that when these brokers in Washington became members of the National Association of Real Estate Boards, they must first have become members of the local board. That is true. No real estate broker who is not a member of a local board somewhere in the United States can become a member of the National Association. He comes in by virtue of his board relationship, his local board relationship and that is exactly what we are going to point out to you, that the local boards are autonomous. They attend to these matters themselves.

42 The National Association has nothing to do with that kind of management of fixing rates, fees or charges, even if it wanted to. It never has tried to and does not want to. But they say that the National Association does want to do that. They say that that is evidenced by an instrument known as a Code of Ethics. That you will see. It is that looking kind of a piece of paper consisting of about 25 or 30 paragraphs or sections and that is an instrument that was prepared by the National Association for the conduct by real estate brokers generally.

Yes, ladies and gentlemen, it does have in it one paragraph to which Mr. Kramer refers and to which he refers in the indictment which is somewhat in these words: The rates, fees and charges of the local board are fair and reasonable in their communities and should be adhered to. That, we shall show you, is only one of the many paragraphs that deal with what we call ethical principles in the carrying on of the real estate business and I say to you now, as I shall say to you when we argue this case at the end, that that instrument, that Code of Ethics, passed in 1924 by the National Association, has been the rule and guide and faith of realtors throughout the United States and has done more and was purposed to do more than any other one thing in the real estate business. What was that? To eliminate fraudulent practices in the real estate business that were all too prevalent, ladies and gentle-

43 men, not only here but all over the United States and when that expression there says the rates are fair and reasonable and should be adhered to, it meant that they should be adhered to in the very meaning with which the first sentence starts, "In the best interests of society."

That was the purpose of the passing of this Code of Ethics and every paragraph in it; that it should be done in the best interests of society, and why?

The books of our Court of Appeals across the campus over there are full of decisions back in the Teens and even before. Certainly it was true when I first came to the bar in 1911; where real estate brokers were sued in this court and their cases finally decided in the Court of Appeals where they were held guilty of fraudulent practices; not telling the property owner what his property was worth, taking commissions from both sides, trying to make both sides pay all the traffic would bear, dealing in your piece of real estate for themselves; pretending to sell it to somebody else and selling it to a straw man, charging you a commission and then turning around and reselling it and putting the profits in their own pockets.

Yes, ladies and gentlemen, that was the reason the Code of Ethics was established by the National Association and is made a part of the rule and guide and faith of every broker. Not that he must charge a given rate in a
44 given circumstance any more than I, as a lawyer, charge everybody the same but, in the interests of the public, that rate established by intelligent honest real estate men after they try to find out what was a fair compensation, should be adhered to and, yes, it should.

The local board here, as Mr. Kramer says, has its Code of Ethics which includes that, yes. I say to Mr. Kramer if that kind of conduct on the part of real estate men, who want to purify their business and to become leaders among honest men in their community, if that be treason in this court, then I will not believe it until you ladies and gentlemen tell me that is so.

These local board members did study their conditions and their rates and they have continued to study them as real estate men have. Every man who is interested in his business has studied them but we say to you that every time you will look at a rate, a fee, a charge or commission so far as the National Association is concerned, and you will see their records, we say to you that that rate, fee or charge is advisory in character and the very paper of which Mr. Kramer complains that we put out in 1941 will have right on the front page a guide as to the rate of fees and charges.

The National Association in the early 1930's was besieged by Government officials, Federal Public Housing, FHA, HOLC, Home Owners Loan Corporation, the RFC,

its branch of Defense Homes. Complaints were made by Government agencies and today you must remember that the Government owns or finances tremendous volumes of real estate all over the United States. Those Government agencies said to the officials of the National Association, "For Heaven's sake, why is it that a service for real estate costs this in one place, twice as much in another place, three times for somebody else," and there was one instance where it was fifteen times as much. "Why don't you standardize and redefine the services that you real estate men render all over the United States?" By the way, you will hear the term used, as we go along, "realtor." That is a coined word, "realtor." It is copyrighted. It is a word that the men who belong to the National Association coined for their own protection. It is a kind of a trade name. They hope and we hope that the word "realtor" means to the country what the word "Tiffany" means in silver; that it is a standard of integrity and honesty. So these National Association members or members of the local boards are what we call realtors and the Government was complaining that realtors here and there and otherwise were not charging anywhere near nor were they performing anything like comparable services. For instance, they came to the National Association and they said, "Why, in some jurisdictions, the charge for a lease is based upon a year to year management. In others, it is based upon the total number of years and paid for in cash. Why don't you define the terms under which you perform real estate services?"

So, in 1935, some letters went out from the National offices to various real estate men throughout the United States which said, "We are having complaints from members of the departments of Government all over the United States. Can't we do something to kind of define what our services are going to be so that they will all know and, whether you are in Houston, Texas, or in Portland, Maine, you will have a definition of what it means to rent a piece of property, to lease a piece of property, to sell it, to trade it. What service do you perform?"

A committee was appointed to study this whole situation. Yes; they tried to find out what the rates, fees and charges were and the services that were performed everywhere and they worked on it for a number of years. In 1941, finally, the Committee had worked out what they thought was a fair guide based upon all of the information that they could find all over the United States and they printed it.

They called it a guide and they sent it out to local boards; not as Mr. Kramer said to you awhile ago to be obeyed, but to be studied and considered, talked about and for the information of the local boards. There wasn't a thing that the National Association required of the local boards with respect to that guide; not at all. The only thing that
47 they did require and do require of every man who is a member of the National Association is that he be honest and upright and fair and square in his dealings in behalf of his principal, which is the public.

So far as his rates, fees and charges are concerned, they do not want them extortionate and they don't want them fraudulently made. There isn't any reason why any member of the local real estate board or any other real estate man in the United States cannot sit down with you and make a transaction with you on any commission that he wants to and we will prove it to you before we get through with this hearing.

In 1943, when Mr. Kramer is complaining that the local association—we were in the war at the time—said that the local association increased its rates and yet we will show you that, on the Floor of Congress, Congressmen upbraided the War Department for having bought real estate and paid one commission in one place and another commission in another place and insisted there ought to be some uniformity for brokerage services over the United States; that they would withhold the appropriation.

Ladies and gentlemen, it was time that the real estate interests that wanted to protect the good name of realtors should try to do everything they could to see that the Government and every individual was properly treated. It is a tremendous job to undertake, the establishment of morals and business standards, ethics, for everybody. The
48 National Association has done the best it can to write into a Code of Ethics the things that a broker, who proclaims himself to be a realtor, should do and, yes, it refers to fees and charges as being reasonable and should be adhered to and reasonable charges should be adhered to by everybody but there is no compulsion on anybody to charge up to a certain amount.

As Mr. Kramer was making his opening statement to you and as I sat there and listened to him, the thought came to me in response to what he had said that local rates, fees and charges become the obligation, they become obligatory upon members of the local board, it occurred to me that the Ten Commandments are obligatory upon you, me and

all of us, and yet we all violate them many times, time after time and that kind of standard rates, fees and charges in the District of Columbia have the same moral concept in behalf of the public in relation to business that the Ten Commandments have in law but there is no obligation binding that disciplines a member, no matter what he charges.

We shall show you in the District of Columbia, over a period of years and years and years, that while these Codes of Fair Practice set reasonable standards that have been testified to in this court times without number, they are not followed with that rigid adherence that Mr. Kramer would think you should believe and we shall show you that,

49 out of thousands of transactions that have gone through the title companies, brokers have charged all kinds of fees, not extortionate ones, however, but very much lower in thousands of instances than this so-called standard of fees and charges that the local Washington board has and the real estate brokers here, in order to make transactions work out between you and me, if we have a trade or if we have a deal to make, do not adhere to any such rigid code as this but they will take a lot for their commission; they will take a second trust note; they will take a note without any security. They will agree to buy a piece of property in the transaction in order to work it out. There is plenty of competition among the real estate brokers and; be it said in their behalf, that it is honorable, ethical, decent competition that has for its purpose the adequate protection of the property owner whose duty it is or for whom the broker works to try to sell or to trade or to finance it for him or to help in changing its zoning, help to do something about its tax troubles, all these things the broker does and he is enjoined, in the interest of the public, to perform those duties with integrity and with honor to himself and to his fellow realtors and to the public at large and it is for that reason, apparently, that the National Association and, yes, these local real estate people, are really indicted here because of the statement of their own idealism as set out in that Code of Ethics.

We say to you, ladies and gentlemen, that if we

50 prove to you, as we fully expect to, that we have not conspired to fix prices and that, as a matter of fact let me say to you we will show that the National Association and its officers never knew when the local board had changed its rates; fees and schedules, didn't know what they were in 1943 and again in 1944. They changed them without any consultation or advice or agreement with the National Association. If we prove all that, how in the world,

ladies and gentlemen, can we be guilty of a criminal conspiracy in the District of Columbia?

Thank you.

Mr. LEAHY: Shall I proceed, your Honor?

The COURT: Do you desire to make an opening statement?

Mr. LEAHY: I think I will.

The COURT: How long will it take?

Mr. LEAHY: Probably about fifteen minutes.

The COURT: Would you rather do it now or would you prefer to recess?

Mr. LEAHY: I would rather recess, if your Honor please.

The COURT: Very well. We will take our customary recess until 1:45.

(Thereupon, at 12:25 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

51 AFTERNOON SESSION 1:45 p. m.

Mr. LEAHY: May I proceed, your Honor?

The COURT: You may.

Opening Statement on Behalf of the Washington Real Estate Board, by William E. Leahy, Esq.

Mr. LEAHY: If the Court please, and you, ladies and gentlemen of the jury: As Mr. Kramer told you this morning, it is customary before the evidence in any given case is introduced to attempt to explain to the jury, briefly, and as clearly as counsel can do the job, just what the issues are in the case, and just what road testimony will travel down, so that you will be aided and helped as the evidence comes in from the witness stand to know just how it fits into the picture which is painted on one side by the prosecution and on the other by the defense.

So in the opening statement we want to try to help you ladies and gentlemen so that as the witnesses take the stand you will know why they are called; you will understand a little better the questions that are put to them and the answers which they give from the witness stand. I hope I can do that so far as the Washington Real Estate Board is concerned.

As you were told, both Colonel Hughes and I represent that Board. That Board is one of the two indicted defendants, the other being the National Board, which has just been represented before you by Mr. Whiteford; and
52 the only excuse I have for taking up your time is the fact that naturally the matters and things which oc-

curred here in the District of Columbia, which were done by our Board—they will have to pardon us if I say—are of a little more interest to us and perhaps for that reason of interest to you as ladies and gentlemen and residents of this District.

I think, however, before we go on to talk about what the evidence is going to show we ought to know a little bit as to what the charge is, because if that is not explained then it will be a little bit confusing to you to follow the testimony.

So, at the outset, what in the world is it we are charged with doing? We are charged with having violated what is known as the Sherman Law. Now, as Mr. Whiteford said, that law was passed almost sixty years ago, about twenty-five years after the close of the Civil War; and whereas you were very carefully selected on the jury because you had no knowledge of this particular case, that does not mean that as a miracle you do not also know as well as any one of us as much which occurred in this country after the Civil War as another. And you will remember that was the era of trusts, as they were called; that is, great, huge combinations of industry which grew up after the close of the war and were an economic menace on the competition in trade.

They became so powerful that they were able to
53 wipe out competition in trade, eliminate it or control it, so that the public interest was injured, because if the trust became so big it could charge the prices it wished to the public; it could control wages and labor for those who worked for that trust, and Congress passed perhaps one of the finest pieces of legislation that was ever enacted, and that was called the Sherman Law, simply and only because Mr. Sherman was in charge of the committee which passed it, just as you have heard so much about the Taft-Hartley Act in the last few years, because Senator Taft headed up the Senate side and Hartley headed up the House.

What did the Sherman Law relate to, because that is what we are indicted under and from which they quote in this indictment, which you will take with you to the jury room?

It was a law which was passed to prevent restraints of trade, and that phrase "restraint of trade" is just as much a word of art, as we know it, as the Evening Star is the name for a newspaper, or the Washington Post, or the Herald, or the News. The Sherman Law dealt with restraints of trade; restraints on the sale and production and distribution of commodities. That is what that dealt

with. That dealt with, however, trusts that were controlling the industry of the nation, contrary to the public good.

And then our courts began to apply the law, just as His Honor will apply the law of the case in this instance.

54 And then we discovered, as we will in this case, that we are not here discussing an academic proposition. We are not here teaching students of a law school. We are here to give you the evidence in a real actual charge preferred against these business men here in the District of Columbia, who organized the Real Estate Board of the District of Columbia.

So the evidence will take a realistic turn. We are dealing with human beings, human problems of economy; livings to make; families to support; the public to be protected. That is what we are dealing with.

While the case is going to be a pretty dry one and uninteresting perhaps, nevertheless you will not need to be concerned about weighing the evidence in the sense that you will be discussing whether a man told the truth or not, because you find coming before you on the witness stand some of the finest citizens of the District of Columbia; men who have lived here practically all of their lives, who selected as the means by which they could continue their lives, marry, raise a family, take care of their children, the sale and management of real estate, just as some of you do this and others do that.

They have spent their lives with never a complaint against a single one of them until this indictment was hurled at them. They have done what they have been doing since they were young men. For a half century here in the District the evidence will show that we have

55 done as our fathers did and those who carried on the business before us.

We will show that everything we did met with popular approval, and you don't need to leave your jury box to know the answer to that, because the evidence is already before you when we asked the question on the *voir dire*, as we call it: Is there anybody on this panel over here who ever had one bit of difficulty with a real estate man, and there wasn't one. Not a single answer came from all of the thirty on this panel. So that what we have been doing in the past we did with full public approval.

We are experts in the real estate business. The testimony will show that the people of this city depend upon the Washington Real Estate Board to a great extent.

When a dispute arises in this court room and when twelve men and women are in the box as you are now, and there

is a dispute as to how much services are worth, and they call upon us as experts to come down and apprise the Court and the jury as to what the services are worth, and for years, the testimony will show that we have testified and the courts have accepted as the value of those services the very something we are indicted for now and charged with.

So that we stand before you charged with restraining the trade and commerce of real estate in the District of Columbia for doing or by doing or not doing just what I have explained to you, something which the common
56 consent of the people of the town, something which the custom of the community has known as accepted; something which the courts have agreed to and been glad to get our aid and assistance and advice.

Now, the testimony will show further that we can't restrain the trade and commerce of the District of Columbia if we wanted to, and we never desired or wished to, or tried to, or conspired to restrain the trade and commerce of real estate in the District of Columbia.

Now, why do I say that? Because of this: The evidence is going to show, as Mr. Kramer told you this morning, that we are just a membership corporation, organized under the laws of the District of Columbia. There are about 1,850 to 1,900 brokers in this city. We are only 250. And the answer to that, again you heard right in this court room when His Honor asked how many had had any real estate dealings, nine stood up; three had bought directly from the owners; three of the nine had bought from somebody who wasn't a member of our Board; the other three we will show were members.

In other words, an owner of a piece of property can sell his house if he wants to and we have no control and try to exercise none over him. If he wishes to put an ad in the Star or the Post or the Herald, he can do so. If he wants to go to 1,600 others, there are 1,600 others to whom he may go. We are just a small group who have banded
57 ourselves together under certain rules and regulations by which we agree to abide one with the other, in the recognition of the best interests of the people of Washington.

We have set ourselves apart from the others, yes, in this: That if anybody wants to join our Association he may, provided his character is such, after our Committee on Admissions has investigated him, so that he is the kind of a man that you would like to associate with; the kind of man who will go out and in his dealings with the public won't reflect

adversely upon the Association to which he has just been elected.

We organized that Association back in 1928, and for twenty years there has never been a complaint against us until this indictment was served without notice on us.

For twenty years we have done every single thing which the Government accuses us of doing now, and the irony of it all is that not less than a month ago, the evidence will show, that we got and received letters from an Assistant Attorney General of the United States dealing with Government property and saying, "We would like to have you help dispose of this property."

Where are we going? What is it all about?

I tried to listen to Mr. Kramer in his opening statement so that I might guide you in the reception of the testimony. I thought he stayed away a bit from the restraint of trade, because you see we can't restrain trade, as the testi-
58 mony will show. We don't control an owner of real estate. We don't go to him and threaten him. We don't try to bribe him. We don't commit any fraud upon him. In fact, our Association is in existence to protect him. So that the trade and commerce of real estate is as wide open as the air which we breathe in the District of Columbia.

Every man is free to do what he wishes. We don't threaten someone who is a non-member. We don't attempt in any way to defraud by false promises so that admissions may be gained. We are not in existence for business. We are a non-profit organization. We don't have to pay income tax because we don't do any business. We are just a membership corporation, such as some of the groups undoubtedly you belong to; some little society or sorority or fraternity of some kind, the only difference being that we took advantage of the Corporation Law of the District of Columbia to incorporate under the non-profit provisions, so that we don't make a penny of profit, because we don't do any business. We are not interested in making profits. We are interested only, as the Code of Ethics, of which too little was spoken to you by Mr. Kramer, will evidence.

So there we stand, this incorporated Association, non-profit, just regulated and guiding under this Code of Ethics, about which I am going to mention a little more in a moment, so that ultimately the public interest may be
59 advanced and we shall receive what custom, the public, and the courts have over these decades determined to be reasonable compensation for services rendered.

There can't be any objection to that. At least the laborer is worthy of his hire, and if it be reasonable, if it has been determined by our courts as reasonable, and if the circumstances under which it is earned are in the public interest, then surely there can be no evil in what we do.

Now, what are those services which we render? As I told you, we are our own little group. We are glad to welcome in anyone who is worthy of membership in that group and who lives up to the rules and regulations of the group.

And in return for the fees which are paid as membership fees, we render peculiar service, directly and indirectly, to the people of Washington. We keep a library in which all the plat books are kept. We keep a careful watch so that the public may know about sales and transfers of property. We keep a careful watch also upon zoning to see to it that zoning regulations are not being evaded or avoided against the public interest.

Yes, we also worked up a sales contract which we thought was fair, in the interest of the public, which disclosed thereon everything that the purchaser of a piece of real estate ought to know, and we did it in such a concealed and furtive manner that we walked over, as Mr. Kramer said, and got it copyrighted.

There isn't anything that we have ever done that you haven't heard of before by advertisements in the newspapers, by publication of our code of ethics for general distribution to whomever we found might be interested in having it.

You will find no evidence here of whispered conversations or agreements had and made down in dark alleys. We have been here as members of the organization we chose in an honorable, public interested and straightforward, and public way.

What is the code of ethics? You know the real estate business isn't just merely walking up to a man and saying, would you like to buy a little piece of property, I have got a piece of property for sale. We are charged here in the restraint of trade in the sale, lease, exchange, management of real estate.

Now, wouldn't you be interested if you were a purchaser, and the evidence is going to show this, if someone was trying to sell you a house in a given area, wouldn't you be interested to know whether the public trends of the city were working out there? Wouldn't you be interested to know whether you were going to find yourself probably 50 feet up on the hill because a new street was going to be

driven through there and would take away your front yard and leave you high and dry up above?

61 Wouldn't you be interested in knowing that the trends of the population of the District were moving away from that particular area so that if five years later you wanted to sell you might not be able to get what you put into it?

If you are, that is the service we are giving. That's what we have given. It costs money, but we think it is in the public interest, and we do it, and we supply all our members with that information, who in turn supply it to the public.

And, too, wouldn't you be interested that if someone was coming up to you to sell a piece of property for you, and our Code will show this, that you would want to have him tell you the truth? Would you want him to tell you that this lot was 78 by 200, when in truth and in fact it was 69 by 160?

If you asked him when the house was built, and he tried to tell you it was built five years ago when it was built ten years ago, or if you asked him about the construction of the house, wouldn't you want to know in truth and in fact?

How much do you and I know about how much it costs to sell a piece of property? What is it worth? How much do the signs cost? How much gasoline is burned up by bringing out prospective purchasers? How much are automobiles used? How much does it cost you for advertising in the newspapers to try to dispose of property?

62 Wouldn't you like to know, if you were on the other side of the bargain, what it was going to cost you to sell so you would know what you were going to net? That's what we do. You know in advance just what it is going to cost you to sell that piece of property.

Let's go to leases. They talk about leases and we whisk over them and through them just as though all it was was to say "Lease," and that is the end.

Let's take a business lease. Let's see what the negotiations of a public lease are.

Some of them are so much a month, like a rental, $50 a month—that's an easy one.

Now, a business moves in town that wants to make a long-term lease for thirty years, but doesn't know whether it is going to succeed in that business, so it says for the first five years I will take it at so much. If I make more then we can step it up the next five years, and if business keeps on we will step up, and finally I will agree to pay you so much over-all.

How much is it worth to negotiate that kind of a lease? Wouldn't you like to know if you were the lessor?

Who is going to advise you what it is worth except these experts who appear here on that witness stand? It is in the public interest that you should know that in advance?

Let's go one step further, where these leases provide not merely for a fixed rental in so much money a
63 month, but also a certain percentage of either the gross or net profit of the business, and let's say the lease contains a right in the lessor to sell the property on 60 days' notice, and the lessee will have to give up possession, or maybe he has a right of cancellation after so many days. Do the problems increase in complexity? Is there something in real estate other than putting a sign on a piece of property or driving the customer out to see where it is?

Or, let's make an exchange. Somebody wants to come over and swap. Of course, swapping has been one of the most dangerous businesses that people indulge in. How about swapping? How do you know what the true value of that other property is? How do you know that it is as represented that the property is worth five or ten thousand dollars?

How do you know what the trends of population of business may be in that area to know the property is going to be in five years?

You know, people don't buy houses every day. Usually when a man buys a home he wants a nice home in a good area where he will be happy and raise his family. He doesn't want to sell it the next day or in two weeks.

Aren't those services which we render under the Code of Ethics, which requires absolute honesty, absolute integrity, and absolute ability, aren't those ethics of public interest?

We thought that they were. The public thought so.
64 Our courts thought so. Customers thought so, but that is the charge that is being preferred against us.

Now, you see then first it is the restraint of trade and commerce, but the testimony will show that we can't restrain because we have no restraint upon the owner at all. He can go where he wishes, sell his own property, we have no control over him.

All we do, as we will show you, is just as if you ladies and gentlemen now were the Real Estate Board, and you put a sign up on that wall, "We have just passed a course in the practical selling, leasing, exchanging, and managing of real estate; we think we are reliable, and we think we know our

business. If you wish any one of us to help you we will charge you so much for our services."

All you do is make a public offer. I can look at it, and I can look at you and say, "I think I will sell it myself."

But things come to the point where it is not so easy to sell. It is not so easy to lose a day's work and sit around and wait around with an automobile to take people out. It is a little bit expensive to advertise in the newspapers, and the rates are going up, and finally you say, "Well, I guess it is better that I employ one of these ladies or gentlemen to help me than it is that I should try to make a mess of it myself."

So all we have done is to make the public offer.
65 If you want us, here we are; you can have our services for so much, and you know in advance that you are going to get able, reliable, efficient, and trustworthy service, and you know just what it is going to cost you. Not only will you know it in advance, but the purchaser will know when he gets this contract that we just told you about.

And that brings us down to the discussion of the point which Mr. Kramer explained to you this morning.

He said in 1943 we had made a change in rates; that we had raised the rates. Well, now, let's go back and see, because there is always a reason for everything that is done. It may be a good reason, or it may be a bad reason, but there is always a reason.

Now, let's see what our reason was.

You will recall that Mr. Kramer stated to you that there was an inner circle or area of real estate and an area outside that circle, in which there had been for years 5 and 3 per cent rates charged for the sale of real estate; we didn't go into the exchange or the leasing or the management.

That is true. It goes back to the horse and buggy days. I don't mean that facetiously; I mean it factually.

In the old days, when we drove horses and buggies Florida Avenue was the boundary. You could get there with a horse and buggy and back at least in the morning, or if you left in the afternoon you could get back. It
66 was a half day out and a half-day back if you showed the property and whatnot.

And for years—and there was no indictment about it, none whatever, because once again it was so much a matter of public knowledge and public approval that the public generally and always knew that the regular rate for the sale of a house and the rental of it was 5 per cent on the

first $5,000 and 3 per cent on everything over—and in those days the outside area was pretty much in the country.

Some of you men, I think, as I see you, are old enough to remember when we had a summer hotel at Fourteenth and Park Road. The whole city was generally just semi-populated. There were a few houses out there.

You remember when Sauls Addition first came in, when Mr. Saul broke his farm up into building lots. And then you remember how Connecticut Avenue developed.

You remember in the days when Wardman Park was built, and it used to be a pretty nice trolley ride going out there to the lake. You were going out to the country.

There wasn't an apartment house or home out there until you got the Chevy Chase and Chevy Chase Circle.

In those days when you used to drive a horse and buggy out to Chevy Chase Circle you were spending a good part of your day going in and out and they charged 5 per cent over-all commission because it was worth more to go
67 out there and it took more time.

Then time began to march on. The city inside the Boundary Line had been built up. There wasn't much more that could be done inside, and the builders began to move out, and we had this tremendous apartment house development on what was before vacant land.

We had builders who would go out and build rows of houses. Still 5 per sent straight, no matter what the cost of the property.

If an apartment house was sold, still 5 per cent.

You remember that McLean property, when it was improved and made into apartments, and we will show you that when that was sold it was straight 5 per cent. Why? Because of that old fashioned adherence to that old boundary that was Washington, when Washington was lighted by gas, and which was no longer representative of any fair compensation or any guide to the fixing of fair compensation for services.

And the automobile came in, and one could go out to Chevy Chase Circle without too much time spent. And then people began to complain. This is something we can give you from the witness stand; it isn't a piece of paper with an indictment and somebody sitting down here and saying, "Now, as an academic proposition," but we are giving you flesh and blood and growth.

People living on one side of the street would say,
68 "Why am I paying 5 per cent when my neighbor across the street paid 3?" It didn't look right, and it

wasn't right. Because the thing was just as much outmoded as the horse and buggy.

And so in 1943, they said we ought to do something here, these complaints are justified; and they made a change.

But did they make it recklessly? Did they make it without thought?

Two years before, three years before, because of these complaints coming in, because of the confusion—I am going to show you one of the maps and I am going to let you figure out whether or not you would charge 5 per cent or 3 per cent after you have seen it—real estate brokers getting into trouble; charges of over-charges, complaints, as I have said, and so they put a committee on the job to study what ought to be done in the public interest.

Now, that phrase isn't pulled out of the air for your reception. Our Constitution, which we will show you, said that we were combining for two reasons in this corporation:

1. To protect and advance the interests of the real estate business of the City of Washington.

2. To protect the public.

That's right in our Constitution and has been there ever since 1928.

We studied that problem as it affected the District
69 of Columbia, and let me tell you right here and now we never cared a snap of our finger about the National or any study that the National made, because we weren't interested in what real estate was selling for in Timbuctoo, or in Atlanta, or in Los Angeles, or in Boston, or in New York, and the testimony will show that we never at any time conspired with the National. We run our own affairs.

We have nothing whatever to do, in the matter of charges in the District of Columbia, with what the National thinks. And if the National undertook to impose their thoughts upon us our organization would tell the National, as it has, don't poach on our preserves; we are running our own business, and we know what the people of the City of Washington need, and against which they ought to be protected.

So, it was our own private, personal, individual study, conducted over a period of two years by some of the best men whom you know and have known either personally or by reputation, before that report was finally made, as to what the best method of securing what would be fair com-

pensation in the public interest throughout the City of Washington, and it was a recognition of facts.

We merely recognized the city had grown; that all of the growth was out in that section which lay outside this circle which Mr. Kramer spoke to you about this morning, and there there had been charged a straight 5 per cent
70 commission for everything, simply because it was outside the circle and because it was difficult to get to, and we cut the straight 5 per cent commission that had theretofore been charged over decades, and we cut it to 5 per cent on the first $50,000 and 3 per cent on everything above that.

Now, the charge was made to you this morning as one which was going to be proved, that we raised rates. What did we do? We recognized the change in the city; recognized its limits as our municipality, and we put the same rates in effect, the 5 per cent and the 3 per cent, except we reduced the limit outside the area and we made it 5 per cent on $50,000 throughout. Did that have an effect of raising the rates?

Now, you know, and you don't need any testimony to tell you so, that the building in Washington has been outside of Florida Avenue, north, east, west, east of the Potomac and west of Rock Creek Park, which was that little narrow island which constituted the 5 and 3 per cent commission. Most all the real estate business in Washington practically was being done out there.

There was cited to you, supposing down in town a house was sold under the old rate on 5 and 3 per cent, and it cost $12,000, and you would find there would be an increase in the commission of $140 in the sale of that house. Of course nothing was said about rising costs. Nothing
71 was said that the rent of the real estate office had goe up; the telephone costs had gone up; food had gone up; clothing had gone up; that the very air you breathe had gone up; and everything has gone up to such an extent that everybody realized the cost of living had advanced. But let's take it squarely, did it raise the rates?

Let's take an apartment house in that area out there and figure that out. A $100,000 apartment, and some of those out there along Connecticut Avenue you couldn't build for a million dollars today; you figure it out in your own mind, what the reduction in the commission is on the sale of a million-dollar apartment, where all you get is 5 per cent on the first $50,000, instead of 5 per cent on the million, and you will see where the rates are.

The purpose for the change was not any intent to restrain trade and commerce in the District of Columbia in the sale of real estate. It was an attempt on the part of the Board, in recognition of what the actual conditions of the town were at the time, to suggest a fair recommended compensation for the members of that Board, and in doing so they equalized to prevent further combine, further possibility of fraud, and the further attempt upon the part of anybody to overreach a seller or a purchaser. That's your 1943 rate. Did we fix if?

Now, they say in the charges against us that we
72 restrained trade and commerce by fixing fees. We never fixed anybody's commission; we never attempted to.

What we did was this: As a body of experts, we set down on a piece of paper what we swear to off that witness stand, what the fair, reasonable compensation is, and we say that that which we have sworn to before juries and before courts ought to be a standard for you if you are admitted into this Association, which you may ask for your services.

We never fixed an individual fee, an individual rate, an individual commission, in any individual case.

In fact, as Mr. Kramer told you this morning, the contract goes to the seller; he reads it over; it is his, and it says there, the regular commission. What is his regular commission? He is told. "Well, I don't think I can pay that; I am taking a loss on my house."

The testimony will show they sit down and talk about that and negotiate what the commission will be, just the same as they negotiate with the purchaser what price he is going to pay.

And although we have been incorporated for twenty years—get this important point in the evidence—never once has any man been criticized or disciplined or called to account or attempted to be suspended or discharged from the organization because he took anything that was different from what they called a standard fee.

73 So that as it works out it is public notice to the public in general, to the seller, and to the purchaser, and why did we do that? Why did we make it a part of our ethics? Because theretofore the business of selling and exchanging and leasing and managing real estate was a matter of every real estate agent charging about what he could get.

He would go to you, for instance; you had a piece of property, and he had a little inside information that you didn't have, and he knew there was a new street going to be cut right square through there, with the result that probably there was going to be a distinct rise in the value of the property, and he would go to you and say, want to sell your property? Yes.

How much do you want for it?

You didn't know anything about the street; you didn't know anything about public trend, and you would say, oh, well, I will take $10,000 for it.

All right; I will sign you up for $10,000 if I sell it, and you get $10,000. Are you satisfied?

Yes, I am satisfied.

He then walks right across to you. Look, Fellow, a new street is going through; business is coming out this way. Two years from now you can get $20,000. Will you give me $20,000?

74 Sure, I will take it, and the buyer gives him $20,000 and he puts $10,000 in his pocket, and he pays $10,000 to the seller. That's what they used to call net listing, where they would go around and persuade the public to list net; and the public, unadvised and uninformed, because they had no such organization such as we have now to advise you—come in and take a look at it and you can see what is happening to real estate—and that became a public scandal.

And then the dishonest practices, as Mr. Whiteford told you this morning, evidenced by cases in the Court of Appeals, to which your attention will be drawn, where an agent would go to you, the seller, and he would come to me, the purchaser, and he would say, how much will you give me if I can get you that piece of property for blank dollars?

I will give you five hundred bucks.

And he would go to you and say, how much will you give me if I will sell it for you?

I will give you $500.

Collecting a fee from both sides.

And then again there would be these squabbles about the sale of property where two or three agents would be involved, and then you would find law suits, you would find them in courts, and you would find the public scandalized.

In order to prevent that we did something. And certainly the public approved of it, because today we have

stood out and the term, as Mr. Roger Whiteford told
75 you this morning, "Realtor" stands for something. It stands as Tiffany on silver.

But what else did we do? Did we intend to restrain trade and commerce? We went further, and through our stocking we got the Real Estate License Law passed here in the District of Columbia, where real estate men toe the mark now before the Licensing Commission.

Were we trying to restrain commerce?

But they said, and it was emphasized by Mr. Kramer, and you will meet the testimony with this, they said your Code of Ethics said what the indictment charges, that we required our members to charge standard rates.

That is the wording in the indictment; you will see it. No such thing! We never required a member to charge any fee excepting we put in there that this has been determined to be the standard fee, you should charge it because in the public interest there ought not to be these temptations to misrepresent, to overreach, and you should not charge lower.

Once again, may I repeat, there is always a reason for everything, and if he who drew the indictment knew as much about the difficulties through which the real estate business here in the District of Columbia has passed, as you ladies and gentlemen are going to know before we get through, you would find out why that was put in there.

Was it to attempt to restrain commerce in the
76 District of Columbia?

I think there is a witness who is going to take the stand, I believe he has been subpoenaed—I am not going to discuss the contents of the document before it comes in evidence, but if he doesn't take the stand we will put him on if it becomes necessary, and when the name of a certain broker was up for membership he wrote in a strong letter objecting to him. He said, "I don't like him; he is a fee cutter, and I don't like his basement tactics."

What were the basement tactics, and what is a fee cutter?

A broker would advertise a piece of property; he would get his sign up on the property. He would be bringing a purchaser out to see that piece of property and he would find this fellow on the piece of property, and he found he had misrepresented the size of the lot, the cost of the house, the general lay out of the house, the kind of heating, but

he was willing to sell it for nothing; he would sell it for $50 or $100, or anything he could get.

Maybe they won't call him because the public got on to him and he went to jail, but he, this man, objected about it because he objected to having such a man in the organization with the right to say "Realtor."

That's why they said it is bad business offering these places at that price, because it leads, as a matter of
77 public disadvantage, to overreaching, exaggeration, ignorant representations, and what we want is the truth and the whole truth, and nothing but the truth with regard to the business.

That, briefly, is the sum total of what we have done. That's why we are here, and as I told you, the testimony will show you, that's why we are here, and as I told you, the testimony will take those lines which I have just indicated to you, that first of all we have no capacity whatsoever to restrain trade and commerce, because we exercise no control.

Secondly, all we do is hold ourselves open to do a certain job in a certain way under certain rules and regulations.

You may employ us or not, just as you please, but if you do we will tell you in advance what the job was going to cost.

We have no control over the competition among our members, because while we advise them that this has been determined to be a standard, that this is fair compensation, nevertheless it is for them and the purchaser or the seller, whichever they represent, to make the bargain he chooses, and he does it.

And so far as conspiring with the National is concerned, you won't find a piece of paper and you won't hear one word that the National ever combined or agreed or conspired with us, because we never did, on the question of our rates or what occurred here in the District of Columbia. We were looking out for our own folks.

If they could give us any information that was
78 worth reading we read it. We collected all we could about real estate information, nationally and locally, just as we maintain a library for the purpose of public information, but at no time was there ever any conspiracy between anybody to do anything.

And we will show you all we did was mind our own business in a law-abiding way as we saw it, with no indication

whatsoever that anyone found fault with any single member of our organization, or our character or type of business, until suddenly we awoke one day and found ourselves indicted. And if we prove those things we are going to ask you ladies and gentlemen of the jury to just continue the stamp of approval the public has placed on us, since we have tried to do the job well, and we ask for a verdict of not guilty.

Thank you.

Mr. KRAMER: If the Court please, before calling the first witness, if there is no objection, I would like to hand to your Honor and counsel for the defendants, in the order in which the Government intends to offer it, the written testimony we are going to offer, and to say to your Honor that there are about fifteen additional pieces of paper that have just been handed to us, and we will have them for counsel for the other side and your Honor tomorrow.

The COURT: Very well.

Mr. KRAMER: Mr. Clerk, will you please mark these?

79 If your Honor please, I have filed with the clerk the originals of these two stipulations with respect to the authenticity and genuineness of documents, and permitting either side to use photostatic copies of documents.

I take it there will be no objection to that?

The COURT: Very well.

Mr. KRAMER: May we ask that all witnesses, except the witness on the stand, be asked to leave the room? The first witness will be Charles Rush, and we would like the others excluded, except Mr. Nelson.

Mr. LEAHY: Also Mr. McConihe.

The COURT: I thought I had excluded all witnesses except Mr. McConihe and the President of the National Association.

The CLERK: Are there any other witnesses in the room?

A WITNESS: I am a witness, I suppose later on; I have a summons, but I was not on the list that was read off by the Court.

The COURT: Have you a summons to appear?

The WITNESS: Yes.

The COURT: You may be excused and remain outside until called.

Mr. KRAMER: Will you call Charles Rush, please?

80 Thereupon, CHARLES J. RUSH was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. KRAMER:

Q. Will you please state your full name?

A. Charles J. Rush.

Q. Where do you live?

A. I live at 4514 Connecticut Avenue, Northwest.

Q. In the District of Columbia?

A. In the District of Columbia.

Q. What is your business address, Mr. Rush?

A. 1417 K Street, Northwest.

Q. What is your business, sir?

A. I am Executive Secretary of the Washington Real Estate Board.

Q. How long have you held that position?

A. Since approximately October 1, 1932.

Q. Were you ever prior to that time secretary to any other real estate board?

A. I was Executive Secretary to the San Antonio, Texas, Real Estate Board, from some time in 1925 until 1931.

I was also Executive Secretary of the Texas Association of Real Estate Boards, in addition to my duties in

81 San Antonio, Texas.

Q. Will you tell the Court and jury, please, what the duties of the Secretary of the Washington Board have been?

A. Well, we just manage and operate a real estate service bureau.

We have hundreds of thousands of cards—185,000 cards covering the ownership and transfer of real property in the District of Columbia.

We maintain statistical records covering ownership, deeds of trust, building permits, building activities.

The COURT: He just wants to know what your duties were as Secretary.

The WITNESS: Those were all mine, sir.

The COURT: Did you do all that?

The WITNESS: I supervised—I beg your pardon, your Honor—I supervise that work in addition to contacts with other organizations in the District of Columbia.

By Mr. KRAMER:

Q. Do you have charge of the files and records of the Washington Real Estate Board?

A. I say I supervise the care of those files.

Q. When meetings are held of the Board of Directors of the Washington Real Estate Board, do you attend them?

A. Most of them.

Q. And when you attend do you keep written
82 minutes of the meetings?

A. Minutes of the meetings of the Board of Directors.

Q. You do?

A. Yes, sir.

Q. If committees are formed, do you keep written minutes of their meetings, if you are there?

A. I only make memorandums of the results of the action taken by committees.

Q. Is it your practice, after attending these meetings, to write up your minutes reasonably prompt after the meetings?

A. If depends entirely upon other duties I have, but within three or four days they are generally written up.

Q. Is the Washington Board a corporation?

A. Yes, sir, it was incorporated in 1928.

Q. You understand when I speak of the Washington Board I mean the Washington Real Estate Board?

A. Yes, sir, I assumed that.

Q. In what jurisdiction was the Washington Real Estate Board incorporated?

A. In the District of Columbia, under the laws of the District of Columbia.

Q. How many members of the Washington Real Estate Board were there on August 27, 1947, the date on which the indictment was returned in this case?

A. I can not give an exact answer on that; around 250, between 250 and 257.

83 Mr. KRAMER: Mr. Clerk, will you please mark these documents Government's 1 and 2 for identification?

(Roster of Washington Real Estate Board was marked Government's Exhibit No. 1 for Identification.)

(New members and change in roster of Washington Real Estate Board was marked Government's Exhibit No. 2 for Identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 1 for identification and ask you to tell the jury what that is?

A. This is a roster of the members of the Washington Real Estate Board which we published in February, 1947.

Q. I hand you Government's Exhibit for Identification No. 2 and ask you to tell the jury what this is?

A. This is a supplemental list of changes in our membership which we made up in mimeograph form.

Q. Would Government's Exhibit 1 for Identification and Government's Exhibit 2 correctly reflect the membership of the Washington Real Estate Board in August, 1947?

A. It would come very close to it, sir.

Mr. KRAMER: I offer Government's Exhibits 1 and 2 in evidence, your Honor.

The COURT: There is no objection, I take it.

Mr. LEAHY: No.

The COURT: They may be admitted.

84 (Roster of Washington Real Estate Board dated February, 1947, previously marked Government's Exhibt No. 1 for Identification, was received in evidence.)

(New members and changes in roster of Washington Real Estate Board, previously marked Government's Exhibit No. 2 for Identification, was received in evidence.)

Mr. KRAMER: I should like to read to the jury, if I may, the names of the members of the Real Estate Board. Unless there is objection, I shan't read the addresses and telephone numbers.

The COURT: Read the the whole list?

Mr. KRAMER: Yes, your Honor.

The COURT: I suggest you pass them to the jury.

Mr. KRAMER: All right.

(Government's Exhibits 1 and 2 were handed to the jury.)

By Mr. KRAMER:

Q. Mr. Rush, are corporations members of the Washington Real Estate Board?

Mr. LEAHY: Wait a minute. The jury is reading that list and I am afraid they are not paying attention to the questions.

Mr. KRAMER: We have now reached this problem, your Honor: Counsel objects to my continuing because the jury is reading the lists. Do you wish me to wait until they have all read the lists?

85 The COURT: No.

The question was: Are corporations members of the Washington Real Estate Board, Mr. Rush.

The WITNESS: There are some corporations, your Honor, which are members of the Washington Real Estate Board.

By Mr. KRAMER:

Q. Who represents these corporations at meetings of the members of the Washington Real Estate Board?

A. At official meetings, at formal meetings, I should say, the corporation is entitled to one vote and it generally sends a representative. It may be one of the senior officers or a junior officer.

Q. Are employees of members of the Washington Real Estate Board also members of the Washington Board?

A. In another category of membership; that of an associate member.

Q. Is every member of the Washington Real Estate Board also a member of the National Association of Real Estate Boards?

A. Only active members, the realtor members.

Q. Only active members of the Washington Board are members of the National Association?

A. Yes, sir.

The COURT: Do you mean by that that they are eligible for membership in the National Association or they
86 automatically become members of the National Association?

The WITNESS: Your Honor, we have two forms of membership. One is the active or realfor membership and the other is the associate membership which is the employee of a member.

The COURT: Suppose he is an active or realtor member in the Washington Board. He is eligible for membership in the National Association?

The WITNESS: He is automatically a member of the National Association by virtue of his election to membership in the Washington Board.

By Mr. KRAMER:

Q. Is the Washington Board itself a member of the National Association of Real Estate Boards?

A. I assume we are. There is no dues paying classification for membership but, back in 1913, the Washington Real Estate Brokers Association which was the predecessor organization, became affiliated with the National Association of Real Estate Exchanges.

Q. So that you say that the Washington Board is a member of the National Association?

A. We feel that we are.

Mr. KRAMER: May I hand this document to the clerk and ask that it be marked Government's Exhibit for Identification No. 3.

The Court: What is that?

87 Mr. Kramer: That is the constitution and by-laws of the Washington Board. The document you have right there, your Honor.

(Constitution and by-laws, revised to July 22, 1941, of the Washington Real Estate Board was marked Government's Exhibit 3 for Identification.)

By Mr. Kramer:

Q. Mr. Rush, I hand you Government's Exhibit for Identification No. 3, and ask you to tell me what that is?

A. This is a photostatic copy of the constitution and by-laws of the Washington Real Estate Board.

Mr. Kramer: If the Court please, I would like to offer in evidence Government's Exhibit 3 for Identification.

The Court: I understand all of these exhibits that you have shown me have been agreed to by counsel for both sides.

Mr. Kramer: The authenticity of this document has been stipulated by both sides.

The Court: I take it you have no objection to the constitution and by-laws being introduced.

Mr. Leahy: The constitution and by-laws of the Washington Real Estate Board?

Mr. Kramer: Yes.

Mr. Leahy: No, I have no objection.

The Court: It may be admitted.

88 (Constitution and by-laws of the Washington Real Estate Board, revised to July 22, 1941, previously marked Government's Exhibit 3 for Identification, was received in evidence.)

Mr. Kramer: If your Honor please, I would like to read Article 14 to the jury.

The Court: Very well.

Mr. Kramer (reading): "Article 14—Rules. The Board by a majority vote at any regular or special meeting may adopt specific rules of practice or ethics and any such rules when adopted automatically become part of these By-laws and are binding alike on every member, provided, however, that every member shall be mailed a written notice at least ten days before the meeting, which notice shall contain the complete substance of the proposed rule." Please mark this Government's Exhibit 4 for Identification.

(Officers and directors of the Washington Real Estate Board for the years 1940-41, through 1946-47, was marked Government's Exhibit 4 for Identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 4 for Identification and ask you to tell me what it is?

A. This is a list of the officers and directors of the Washington Real Estate Board from 1940-41 to 1946-47, which we prepared and furnished to you, sir.

89 Mr. KRAMER: I ask that Government's Exhibit 4 for identification be admitted in evidence, your Honor.

The COURT: No objection, I understand.

Mr. LEAHY: No objection.

The COURT: It may be admitted.

(List of officers and directors of the Washington Real Estate for the years 1940-41 through 1946-47, previously marked for identification Government's Exhibit 4 was received in evidence.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 3 in evidence and ask you if there has been any change made in that document that you are aware of since the date it was prepared?

A. This is the last printed copy revised to July 22, 1941, and I don't know of any changes having been made.

Mr. KRAMER: Mr. Clerk, will you mark this for identification?

(Code of Ethics of the Washington Real Estate Board, dated April 30, 1943, was marked Government's Exhibit 5 for Identification.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit 5 for Identification and ask you to tell me what it is?

A. This is the Code of Ethics of the Washington Real Estate Board.

Q. Was that the Code of Ethics that was in effect on August 27, 1947?

90 A. Yes, sir, it was.

Mr. KRAMER: I move that it be admitted in evidence, if your Honor please.

The COURT: I take it there is no objection.

Mr. LEAHY: None, your Honor.

The COURT: It may be admitted.

(Code of Ethics of the Washington Real Estate Board, dated April 30, 1943, previously marked Government's Exhibit 5 for Identification, was received in evidence.)

Mr KRAMER: I would like to read this to the jury, if your Honor please.

The COURT: All of it?

Mr. KRAMER: The whole of it.

The COURT: Pass it to the jurors and let them read it.

(Government's Exhibit 5 was handed to the jury.)

By Mr. KRAMER:

Q. Mr. Rush, what is a realtor?

A. A realtor is a real estate broker or agent who is affiliated with a local real estate board which is, in turn, affiliated with the National Association of Real Estate Boards and one who is guided by the rules and regulations and the Code of Ethics of the National Association of Real Estate Boards or an individual member located in an area in which there is no local real estate board, who is
91 affiliated with the National Association as an individual realtor.

Q. Is every active member of the Washington Board a realtor?

A. We so hold them to be, Mr. Kramer.

Q. Is there anyone who engages and acts as a real estate agent in the District of Columbia and who is not a member of the Washington Board a realtor?

A. There are none in so far as we know except several individuals in the governmental service, such as the Federal Housing Administration, the Alien Property Custodian, I believe, in the Department of Justice, and so on who hold membership in the National Association as individual members.

Q. But no active real estate broker that you know of in the District is a realtor unless he is a member of the Washington Board, is that right?

A. There are some. They are still realtors.

Q. I say they are not active real estate brokers, are they?

A. There have been some who have carried on, who have taken leave of absence from the governmental jobs and who handle local real estate practice, having complied with the real estate license law, and they were then eligible to carry on that work.

Q. They were members of the National Association?

A. They were members of the National Association.

Mr. KRAMER: Will you mark this for identifica
92 tion please?

(Code of Ethics of the National Association of Real Estate Boards was marked Government's Exhibit 6 for Identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 6 for Identification and ask you to tell me what that is?

A. This is a copy of the Code of Ethics of the National Association of Real Estate Boards which has been generally distributed and this is a copy which we gave you and Mr. Maletz at the office.

Q. Was this in effect on August 27, 1947?

A. I know of no changes in so far as the national organization is concerned.

Mr. KRAMER: I move that it be admitted in evidence.

Mr. LEAHY: Is that the National Code of Ethics?

Mr. KRAMER: Yes.

Mr. WHITEFORD: No objection.

The COURT: Very well, it may be admitted.

(Code of Ethics of the National Association of Real Estate Boards, previously marked Government's Exhibit 6 for Identification, was received in evidence.)

Mr. KRAMER: I would like to read two articles from this to the jury, if your Honor please.

The COURT: Very well.

93 Mr. KRAMER (reading): Article 9 reads:

"The schedule of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor." Article 35 reads:

"No instructions nor inducements from any client or customer relieve the Realtor from his responsibility strictly to observe this Code of Ethics."

Mr. WHITEFORD: Mr. Kramer, would you read, in that connection, Articles 28, 30 and 31? They all have to do with compensation.

Mr. KRAMER: May I suggest that counsel read those parts of the exhibit which he desires read, your Honor?

The COURT: Very well. You may read them, Mr. Whiteford.

Mr. WHITEFORD: I will read them.

Ladies and gentlemen, one article relating to fees and compensation was Article 9 which Mr. Kramer read to you. There are, in addition, several other sections in this Code of Ethics that from time to time we shall read to you but, in that connection, I want to read three now.

"Article 28. A Realtor when acting as a broker should make it clear for which party he is acting, and he should not receive compensation from more than one

party except with the full knowledge and consent of all parties to the transaction.

"Article 30. In closing transactions, the Realtor should advise the use of legal counsel when the interests of any party to the transaction appears to require it; and in all cases he should exercise care in the preparation of documents so that they shall embody the exact agreements reached.

"Article 31. At the time the agreement is reached as to the terms of the transaction the Realtor should fully inform each party regarding commissions and other expenses to which each is respectively liable."

Mr. KRAMER: Will you mark this Government's Exhibit 7 for identification?

(The constitution and by-laws of the National Association of Real Estate Boards was marked Government's Exhibit No. 7 for Identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit for Identification No. 7 and ask you to tell me what that is?

A. This is a copy of the constitution and by-laws of the National Association or Real Estate Boards corrected to May 15, 1945. It is a copy furnished us by the National Association.

Q. When you say furnished you by the National
95 Association, to whom do you refer? What office sent it to you?

A. The office in Chicago, National Headquarters at 22 West Monroe Street. By the way, it was sent at our request. We don't keep them on hand for general distribution.

Mr. KRAMER: I move that Government's Exhibit No. 7 for identification be admitted in evidence, if the Court please.

Mr. WHITEFORD: No objection.

Mr. LEAHY: No objection.

The COURT: Very well; it may be admitted.

(The constitution and by-laws of the National Association of Real Estate Boards, previously marked Government's Exhibit 7 for identification, was received in evidence.)

Mr. KRAMER: I would like to read one section from the constitution, your Honor, and one section from the by-laws.

The COURT: Very well.

Mr. KRAMER: Article III, Section 1—Membership,

"(A) The members of the National Association shall consist of four classes: (1) Member Boards, (2) Board

Members, (3) Individual Members and (4) Property Owner Members.

"(B) Member Boards shall consist of local real estate boards which shall include city, county, or intercounty boards and State or Provincial Associations of real estate boards as provided in Section 4.

96 "(C) Board Members shall consist of active members in good standing of any Member Boards as hereinbefore defined.

"(D) Individual members shall be such persons as are elected to direct membership under the provisions of Section 5 of this Article.

"(E) Property Owners Members shall be such owners of real property as are, or become, affiliated with Member Boards if resident in a community where there is a Member Board, and owners of real property in territory where there is no Member Board."

I would also like to read Article III from the By-Laws:

"ARTICLE III.

"CODE OF ETHICS.

"Section 1. Each Member Board shall adopt the Code of Ethics of the National Association as a part of its rules and regulations for violation of which disciplinary action may be taken.

"Section 2. Any Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its constituent members may after due notice and opportunity for hearing, be expelled from membership in the National Association by the Board of Directors."

Will you mark this Government's Exhibit for identification.

97 (Reprint of a newspaper advertisement of the Washington Real Estate Board was marked Government's Exhibit 8 for identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 8 for identification and ask you to tell the jury whether or not that is a publication of the Washington Real Estate Board?

A. This is a reprint from a newspaper—

Mr. KRAMER (interposing): Excuse me. If your Honor please, will you ask the witness to answer the question?

The Court: I think he was starting to answer the question. What was wrong with the way he was answering it?

Mr. Kramer: I asked him if it was publication of the Washington Real Estate Board.

The Court: He was answering your question. He stated it was a reprint from a newspaper.

The Witness: This is a reproduction, your Honor, of a newspaper advertisement which we reproduced for distribution among our members.

The Court: What is wrong with that answer?

Mr. Kramer: There is nothing wrong with it except it is not an answer to the question I asked, if your Honor please.

The Court: What did you want?

Mr. Kramer: I wanted to know only if the Washington Board published that piece of paper.

98 The Court: He said that was an advertisement they put in the paper that they reproduced and distributed.

Mr. Kramer: That was after your Honor asked him the the question.

The Court: Go ahead with the next question.

Mr. Kramer: I move that Government's Exhibit 8 be admitted in evidence, if your Honor please.

The Court: Is there any objection, Mr. Leahy?

Mr. Leahy: No objection.

The Court: Admitted.

(Reprint of advertisement in a newspaper of the Washington Real Estate Board, previously marked Government's Exhibit 8 for Identification, was received in evidence.)

Mr. Kramer: I would like to read, if your Honor please, only the advertising material and not the names of the members.

The Court: Very well.

Mr. Kramer: (reading): "All realtors are real estate men * * * but not all real estate men are realtors * * *.

"Take careful notice of the difference! When your problem is buying, selling, leasing, renting, financing or building, call upon a Realtor * * *. It is your best guarantee of dependable, experienced real estate service. Realtor is a professional title earned by long experience, sound knowledge and personal integrity * * * and held only

99 by strict adherence to a written Code of Ethics. In the Metropolitan area, only members of a Real Estate Board which is affiliated with the National Association of Real Estate Boards and licensed thereby, are privileged to use it * * * a privilege neither freely given nor lightly

held! The Real Estate Board members listed below are all Washington Realtors * * * avail yourself of their services to assure yourself complete protection and competent real estate counsel * * * at no extra cost."

By Mr. KRAMER:

Q. Mr. Rush, from the time when you came to the Washington Board in 1932 until August 27, 1947, was every proposed applicant for membership in the Washington Board required to submit his membership application in writing?

A. Yes, sir.

Mr. KRAMER: Will you mark this Government's Exhibit for Identification No. 9?

(Photostatic copy of application for membership in the Washington Real Estate Board was marked Government's Exhibit No. 9 for Identification.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit for Identification No. 9 and ask you to tell me whether or not that is an example of the form of application for membership that the Washingtn Board has used?

100 A. This is a copy of the form which we have used. We have had three similar forms since 1932 but this was the last one. We are now using a mimeographed form.

Q. Do you remember when you started to use that form, approximately?

A. I can't say, Mr. Kramer, exactly, but it was, I think, in the late Thirties.

Q. So that commencing sometime in the late Thirties until August of 1947, every applicant for admission to the Washington Board was required by the rules of the Board to submit his application on a form similar to that?

A. They always have been, sir.

The COURT: Excuse me, gentlemen.

Mr. Whiteford, I understand you are due in the Court of Appeals at 3:30.

Mr. WHITEFORD: Yes, sir.

The COURT: Very well. We will take a recess until 10 o'clock.

Ladies and gentlemen, I must caution you not to discuss this case amongst yourselves or with anybody else. You are to keep your minds open. You are to come to no conclusion until the matter has been finally submitted at the conclusion by the Court.

(Thereupon, at 3:15 o'clock p. m., a recess was taken until 10 o'clock a. m. the following day, Tuesday, May 25, 1948.)

101 In the District Court of the United States
FOR THE DISTRICT OF COLUMBIA.

Criminal Action No. 950-47

UNITED STATES OF AMERICA
PLAINTIFF,

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and WASHINGTON REAL ESTATE BOARD
DEFENDANTS.

Washington, D. C.,
Tuesday, May 25, 1948.

The above entitled action came on for further trial before the Honorable EDWARD M. CURRAN, Associate Justice, and a Jury, at 10 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor H. Kramer, Trial Attorney.
Joseph P. Kelly, Jr., Herbert N. Maletz, C. Heyward Belser, Attorneys, Department of Justice.

102 Roger J. Whiteford, John J. Wilson, Jo V. Morgan, Jr., Attorneys for National Association of Real Estate Boards.

William E. Leahy, William J. Hughes, Jr., Attorneys for Washington Real Estate Board.

104 PROCEEDINGS

THE CLERK: The case of National Association of Real Estate Boards and Washington Real Estate Board.

Mr. KRAMER: Mr. Rush, will you resume the stand?

Thereupon, CHARLES J. RUSH having been previously duly sworn, resumed the stand and testified further as follows:

Mr. KRAMER: Mr. Clerk, will you please mark these two instruments Government's Exhibits for Identificaton 10 and 11?

(Sample forms of application for membership in Washington Real Estate Board marked for identification Government's Exhibits 10 and 11.)

Direct Examination (resumed).

By Mr. KRAMER:

Q. Mr. Rush, just before we closed yesterday afternoon I handed you Government's Exhibit for Identification No. 9.

and I asked you to tell us whether or not that is a sample of form of application for membership that the Washington Board has used.

"A. This is a copy of the form which we have used. We have had three similar forms since 1932, but this was the last one."

I now hand you Government's Exhibits 10 and 11 for identification and ask you if they are the other two samples of application for membership forms that were used for the Washington Board prior to August 27, 1947?

105

A. They are, sir.

Mr. KRAMER: Thank you. If the Court please, I move that Government's Exhibits for Identification Nos. 9, 10, and 11, be admitted in evidence.

The COURT: Very well.

(Sample forms of application for membership on Washington Board, heretofore marked for identification received in evidence as Government's Exhibits 9, 10, and 11.)

Mr. KRAMER: I would like to read to the jury only one sentence from each of the three.

Government's Exhibit 9 states:

"In making this application we hereby waive all claims against the Board, its officers, directors, employees, and any and all members, arising out of any act in connection with the consideration, rejection or acceptance of this application; having read the constitution and by-laws, code of ethics and other rules of the Board, agree that if elected to membership, we, subscribe to them and agree that we, and all employees, will be guided by them in our transactions wth the public and our fellow member. We agree to pay dues of $100 per year, payable annually in advance or quarterly on October 1, January 1, April 1, and July 1."

106

"We hereby apply for active membership in the Washington Real Estate Board and having read its constitution and by-laws, code of ethics, and all conditions of membership, agree to abide by same."

Government's Exhibit 11 reads in part:

"We hereby apply for active membership in the Washington Real Estate Board and agree to abide by its constitution and by-laws and all conditions of membership."

Br. Mr. KRAMER:

Q. Calling your attention to Government's Exhibit 9, Mr. Rush, you will observe that reference is made in the

document to the other rules of the Boards. Are you familiar with that provision?

A. Yes, sir.

Q. Would you tell me, please, what the other rules of the Board were?

A. We have rules for the division of commissions between real estate brokers, between co-operating brokers who work with each other in the sale of property, and that is the general rule that is referred to.

Q. Was the schedule of commissions a part of the rules of the Board?

A. I don't know whether we ever took that as being a part of the rules of the Board.

107 Q. Are you not sure, one way or the other?

A. I would say that it was a guide for the information of the public and the broker's in their transactions but it was never called the rules.

Q. Do you know whether it was your practice when persons came to apply for membership to the Washington Real Estate Board and their application was accepted, whether or not you handed them, as a general practice, a copy of the schedule of commissions of the Washington Board?

A. Not until after they had been elected. We would then send them the Code of Ethics, the division of commissions, a copy of the Constitution and By-Laws. We had originally furnished them with that at the time the application was received.

Q. My question—I am sorry if I confused you—was whether, among the documents that you gave the members after they were elected was the schedule of commissions adopted by the Board?

A. Yes, sir.

Q. Mr. Rush, are you familiar with a committee of the Washington Board known as the Special Commission Study Committee?

A. There have been various committees of that name appointed during the past.

Q. While you were secretary?

108 A. While I was secretary, yes, sir.

Q. Do you remember when the committee known as the Special Commission Study Committee was formed or appointed?

A. I can't recall that, Mr. Kramer, without having to go through the records because there were two or three years in which there were these committees.

Q. I ask you the same question with respect to the Brokers Committee. Do you remember when that was formed by the Washington Board?

A. It must have been prior to my time as Secretary of the Board because each year a brokers committee is named. It is a standing committee of the Board.

Mr. KRAMER: I ask that this be marked Government's Exhibit for Identification No. 12.

(Memorandum of Special Commission Study Committee, dated February 10, 1939, was marked Government's Exhibit 12 for Identification.)

The COURT: What do you expect to prove by Government's Exhibit No. 12 for Identification?

Mr. KRAMER: We expect to prove the purposes for which the Commission Study Committee was appointed.

The COURT: Back in 1939?

Mr. KRAMER: That is right, your Honor, and the action which it took. The indictment alleges that the combination or conspiracy was formed several years ago.
109 The Government's position is that it was in operation at that time and this document will show the action which was taken.

The COURT: Is there any limitation on this?

Mr. KRAMER: On what, your Honor?

The COURT: On the charge in the indictment?

Mr. WHITEFORD: Yes, sir. There is a limitation and I want to call the Court's attention to the last paragraph of the indictment. I think we are entitled to have, from Mr. Kramer, some statement as to how he expects to bring this Exhibit 12, which bears the date of 1939, within the statute.

The last paragraph of the indictment reads:

"The combination and conspiracy, hereinbefore alleged, has operated and has been carried out, in large part, within the District of Columbia. Within the applicable period of the statute of limitations, in effectuating and carrying on said combination and conspiracy, defendant Washington Board within the District of Columbia has held meetings at which rates of commission have been fixed and agreed upon."

I don't see, from the standpoint at least of the National Association how, unless there is some showing that somebody from the National Association either knew about this committee or authorized it or directed it or had something to do with it in 1939; there is any theory possible under which it would be introduced against the National Associa-

tion. I certainly object to it unless it is shown how it will be connected up.

116 Mr. KRAMER: With respect to the first point that Mr. Whiteford raised, the date of the indictment, the Government alleges that the combination, the conspiracy has continued for some time. Accordingly, any evidence on the formation of a conspiracy or the action that it took during its life are admissible against the Washington Board.

With respect to the contention that he raises that the document is not admissible against the National Association, the Government's position is we have established a *prima facie*,—something to rebut of course, a *prima facie* conspiracy or combination to which the National Association was a party by virtue of its requirement that Article 9 of the Code of Ethics of the National Association gives—

The COURT: You take the position you have already made a *prima facie* case?

Mr. KRAMER: Against the National Association by virtue of the Code of Ethics which requires each member—

The COURT: What does that mean?

Mr. KRAMER: It means that each member of the Washington Board, if your Honor please, is bound by agreement with the National Association to charge for his services whatever schedule of commissions—

The COURT: Is that the pitch of the Government's case?

Mr. KRAMER: I don't understand what you mean by "pitch", if the Court please.

The COURT: Is that the crux of the Government's case?

111 Mr. KRAMER: It is not. It is half of the Government's case. The other half is the action of the Special Commission Study Committee.

Mr. LEAHY: I object, if your Honor please. Of course, *the indictment mentions no period whatsoever* as the beginning date of the conspiracy. All it says is that for many years, up to and including the date of the return. The only guide by which we go as to what the meaning of "many years" is is the reference Mr. Whiteford has just stated to the Court which is within the applicable period of the statute of limitations and, in his opening statement to the jury, Mr. Kramer did not go back further than 1943 and he mentioned that date particularly, February, 1943. This is back in 1939, February 10, four years earlier. We have the objection that it is away outside the applicable por-

tion of the statute of limitations which is a three-year statute and, secondly, if your Honor will notice, this is merely a memorandum.

This objection will come up again and again because, as to those particular documents to which we stipulated as to their authenticity,—making no objection to their authenticity at all, but reserving relevancy and materiality,—you will find this is just a record of a conversation. No action was taken. It is not the action of the corporation, either the National or the Local, and they intend to offer in here a few memoranda. This is entitled "A memorandum"
112 and your Honor will note on the second page there was nothing done about it. No official action was taken by the corporation or anybody else. It is just a memorandum of three or four men expressing opinions, pure hearsay, opinion evidence and in no way binding upon us. They might as well have said it on the street corner as to have said it here. We object to hearsay and opinion evidence which is in no way binding on us until we adopt or follow or take some action with reference to it. We object to the document.

Mr. KRAMER: If the Court please, in our opening statement I said at page 35 of the transcript:

"The evidence will also show that the Washington Board had a committee to deal with this problem. It was known as the Special Commission Study Committee. It was formed, the evidence will show, in the 1930's. In May of 1939 that committee decided to withhold action respecting a change in the established rate of commissions in Washington until after the report had been received from the National Association."

Mr. LEAHY: That is my point. They didn't do anything.

Mr. KRAMER: Your statement was it was not stated in the opening statement.

The COURT: Government's Exhibit No. 12 is excluded. Proceed with the next question.

Mr. LEAHY: And in the indictment, they allege nothing was done until 1943.

Mr. KRAMER: May we have the opportunity of re-
113 offering it after the evidence unfolds, your Honor, and discloses the nature of the document.

The COURT: Yes, you may at any time do that.

Mr. KRAMER: Will you mark this as Government's Exhibit No. 13 for Identification; the map.

(Map of the District of Columbia prepared in 1934 was marked Government's Exhibit No. 13 for Identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit for Identification No. 13, and ask you to tell me whether or not that was prepared by the Washington Real Estate Board?

A. This was prepared by the Washington Real Estate Board from the entire District of Columbia map and reproduced by Kirby Lithograph Company for our organization in 1934.

Q. Do you have a larger map in the courtroom today, Mr. Rush?

A. Yes, sir.

Mr. KRAMER: I ask that this be marked.

The COURT: Is this the same map?

Mr. KRAMER: It is. It is a larger map.

The COURT: It is the same one?

Mr. KRAMER: Yes.

The COURT: Suppose you mark it Government's Exhibit 13-A.

114 (Large map of the District of Columbia was marked Government's Exhibit 13-A for Identification.)

Mr. KRAMER: If the Court please, I move the admission of Government's Exhibits for Identification 13 and 13-A.

The COURT: They are the same thing?

Mr. KRAMER: They are, sir.

The COURT: I will admit 13-A.

Mr. KRAMER: The important thing, if the Court please, to the Government's case is to get the writing on this, Exhibit 13, that is not on Exhibit 13-A so if you admit one I would prefer to have 13 admitted.

The COURT: I will admit Exhibit 13.

(The map of the District of Columbia previously marked Government's Exhibit 13 for Identification, was received in evidence.)

115 Mr. KRAMER: The only part of this document which I would like to read to the jury is the statement on the bottom of it, which says:

"Lines dividing 5 per cent commission zone from 5 and 3 per cent. Those properties fronting on the boundary lines on both sides of the street should take the lower rate."

Mr. Clerk, will you mark this for identification as Government's Exhibit No 14?

(Constitution and by-laws, Code of Ethics, and Schedule of Commissions of Washington Board as of October 1, 1931, marked for identification as Government's Exhibit No. 14.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 14 for identification and ask you if it is a copy of the constitution and by-laws, Code of Ethics, and Schedule of Commissions of the Washington Board as of October 1, 1931?

Mr. LEAHY: I object, if your Honor please.

The COURT: Sustained.

Mr. KRAMER: What is the basis?

The COURT: 1931? You want to show they are the ones that are in force?

Mr. KRAMER: I haven't offered it in evidence yet.

The COURT: You asked him a question, and the question was objected to and sustained.

116 By Mr. KRAMER:

Q. Was this Schedule of Commissions in effect, Government's Exhibit 14 for Identification, in 1939, through 1942, Mr. Rush?

A. I would have to go through my records to answer you yes or no, sir.

Q. Where are your records?

A. Some are in the files here and others are in my office.

Q. What records would you have to go through to find out if this document is a copy of the Schedule of Commissions of the Washington Board in effect in 1942? Don't you know it when you see it?

A. Mr. Kramer, as secretary of an organization of several hundred members, working for more than 25 years, I can not remember all of these details. I would have to bring back to my mind the dates on the charges. There were very few changes made, but I can not recall them offhand right here.

Q. Do you remember whether in 1942 the Schedule of Commissions of the Washington Board established a commission rate for sales of real property?

Mr. LEAHY: I object as beyond the statute.

Mr. KRAMER: If your Honor please, in the first place it isn't beyond the statute. The statute of limitations had not started to run. In 1941 it was tolled by the war, so we are within the statutory time.

117 Mr. LEAHY. Where did you get that law?

Mr. KRAMER: Congress passed a statute—

The COURT: Let's have it; let me see it.

You mean the defendant was in the armed services?

Mr. KRAMER: No, I am not referring to that. I am referring to that. I am referring to a specific statute with

respect to antitrust prosecution. I have the statute, but not in the official form. I will have to send out for it. However, I have a book (handing book to the Court).

The COURT: Have you got it changed here from 1935 to 1946?

Mr. KRAMER: That is right.

The COURT: Extending it to June 30, 1946?

Mr. KRAMER: That is correct, and at that period it started to run again.

The COURT: It was suspended from 1942 to 1946, is that right?

Mr. KRAMER: That is right, your Honor. It started to run on July 1, 1946.

It is our contention that the dating back on August 27, 1947, brought us down on that date, the day on which the indictment was returned, to December 8, 1940, and that anything not prior to December 8, 1940, is within the statute of limitations applying to the antitrust laws.

The COURT: You are asking this witness now
118 about the schedule of commissions.

Mr. KRAMER: That is correct.

The COURT: And he says he can't answer your question.

Mr. KRAMER: He said he couldn't remember without looking at his papers, but the basis of counsel's objection was the statute of limitations.

Mr. LEAHY: And I still object to it. The statute of limitations can't begin to run until we have something from which it begins to run.

When does he say that this conspiracy began? In his opening statement he said 1943.

The COURT: Well, I think the position he takes is that he has three years prior to 1942, or rather, two years prior to 1942, but he says it was tolled from 1942 to June 30, 1946, and then it would start running again June 30, 1946, until the time the indictment was returned in 1947. Is that correct? Was it running in 1947?

Mr. KRAMER: Substantially so—August 27, 1947.

The COURT: So you can't go behind 1940, can you?

Mr. KRAMER: All I can say in response to your Honor's question is that the statute of limitations doesn't go back.

My position has been, and I have not been able to be as clear as I would like—

The COURT: Can you put in evidence, in this type of prosecution, acts which you claim are violations of
119 law prior to the time the statute started to run?

Mr. KRAMER: Our position is that a combination once formed continues every day it is in existence, and that if the combination were formed—

The COURT: That may be true, but that is within the statutory period, but can you go away back to 1919?

Mr. KRAMER: If a combination had lasted that long. We don't claim any such thing here. The only evidence we have prior to 1940—

The COURT: When do you claim it started?

Mr. KRAMER: We don't know the exact date, but if we knew when the standard schedule of commissions was adopted by the Washington Real Estate Board, and agreed to, as we say, by each member, we would fix that as the date the combination began.

The COURT: What do you mean by the standard schedule of rates?

Mr. KRAMER: I was about to bring that out and the witness was having difficulty in remembering.

The COURT: Ask the witness if there is such a thing as a standard schedule of rates.

By Mr. KRAMER:

Q. Mr. Rush, while you were secretary of the Washington Board at all times has there been in effect a schedule of commissions and fees adopted by the Washington
120 Real Estate Board as standards for its members?

A. Yes, sir.

The COURT: When was that adopted?

The WITNESS: Now, the previous document shown to me was in effect prior to my employment, sir.

The COURT: The Prosecutor is asking you about what you know during the time of your employment. Since you have been secretary of the Board has the Board adopted a standard schedule of rates?

The WITNESS: Yes, sir.

The COURT: When was that adopted during your time as secretary?

The WITNESS: I have published them at different times, but the standard of rates was republished at different times.

The COURT: And were they the same?

The WITNESS: Not until might I refer to some papers I have of my own?

Mr. KRAMER: Certainly.

The WITNESS: We published in December, 1934, a sche-

dule of commissions. The next one was February 16, 1943, and the next one was December 19, 1944.

The Court: Was there any difference between the schedule that you issued in 1943 and the one that was issued in 1944?

The Witness: Very minor changes. I call them modifications and clarifications. There were no changes in the rates.

121 The Court: Was there any difference between the schedule issued in 1934, did you say—

The Witness: Yes.

The Court: —and 1943?

The Witness: Yes, sir; that is when we eliminated the two commission boundary zones.

The Court: That is these two that are illustrated on the map?

The Witness: Yes, sir; that was done in 1943.

Mr. Kramer: If your Honor please, I think the witness has been very helpful, at least to counsel for the Government, and I withdraw my offer of Government's Exhibit 14 and offer the one he has in his hand as having been in effect in 1934, when he was secretary.

The Court: Government's Exhibit 14 is withdrawn?

Mr. Kramer: Yes.

(The document heretofore marked for identification and offered in evidence as Government's No. 14 was withdrawn.)

By Mr. Kramer:

Q. Which one was it?

(No response.)

Mr. Kramer: The witness has just whispered to me that this copy is not exact.

The Witness: It is not the exact 1943 schedule,

122 because in 1943 the changes were made and we pasted in a little inserter in there showing the 1943 changes.

By Mr. Kramer:

Q. In other words, we would have to get a copy of this document you have in your hand marked Washington Real Estate Board that didn't have this pasted over it in order to have an accurate copy?

A. Yes, sir.

Mr. Kramer: Can counsel produce that?

Mr. Leahy: No. I didn't go back fourteen years to 1934 to find anything.

By Mr. KRAMER:

Q. Mr. Rush, do you think you have a copy in your office that is not pasted on?

A. I may have, but I doubt it.

Mr. KRAMER: I ask you at your convenience, sir, to look, and we will go on to the next point.

Mr. LEAHY: You mean you offer it?

Mr. KRAMER: I haven't offered it yet. He says it isn't an accurate copy of the document.

By Mr. KRAMER:

Q. Mr. Rush, do you remember whether or not there was any member of the Washington Board who was a member of the Committee on Rates, Rules and Customs of the National Association of Real Estate Boards in 1940 and 1941?

123 A. I do not know what year our Board had a member on that Committee.

Q. But you do remember, do you, that there was a member at some time during your service as secretary?

A. Yes, our members serve on many national committees. After all, we are a part of the National Association.

Mr. KRAMER: I ask that this document be marked as Government's Exhibit for Identification No. 15.

The COURT: Which one is that?

Mr. KRAMER: Minutes of meeting of Board of Directors of May 17, 1939.

(Minutes of meeting of Board of Directors, Washington Real Estate Board, May 17, 1939, marked for identification as Government's Exhibit No. 15.)

By Mr. KRAMER:

Q. Mr. Rush, do you recall that the Special Commission Study Committee made a report to the Board of Directors of the Washington Board in May, 1939? Do you recall whether or not they did?

A. I do not recall.

Q. I hand you Government's Exhibit No. 15 for identification and ask you to read it, particularly the second page, and tell us whether or not that refreshes your recollection.

Mr. LEAHY: Is Government's Exhibit No. 15 the minutes?

Mr. KRAMER: That is the minutes.

124 Mr. LEAHY: Is that the minutes of the Board meeting?

The COURT: The Board meeting. This meeting shows that no action was taken at all: Correct?

Mr. KRAMER: That minute is shown to the witness for the purpose of refreshing his recollection that the Special

Commission Study Committee decided to withhold action until after the National Association had made its report.

The Court: Then why are you introducing it?

Mr. Kramer: I haven't introduced it yet; I was showing—

The Court: I take it you were going to introduce it?

Mr. Kramer: I was hopeful I wouldn't have to if the witness would testify he remembers the Special Committee took no action until the National Association had reported.

The Court: Suppose he does remember—

Mr. Kramer: If he states—

The Court: It is a negative matter, isn't it?

If you want to show that upon receipt of a recommendation or an agreement between the National Association and the Washington Board in fixing these rates, that is one thing, but to show a minute of the Board showing that no action was taken, how is that admissible?

Mr. Kramer: Certainly we can show the background leading up to the action. We are trying to show that the Washington Board was not, as the statement was made in the opening by counsel for the Washington Board, inde-
125 pendent; that it did wait until it got recommendations from the National Association.

The Court: Why don't you show that by showing when the National Board sat upon the Local Board, not what negative action the Local Board took?

Mr. Kramer: Is it negative, your Honor?

The Court: If it does nothing I think it is negative, yes.

Mr. Kramer: You don't think this will assist the jury?

The Court: I don't know whether it will assist the jury or not, but I think we ought to confine our evidence to affirmative matters that show action taken by either the Washington Board or the National Association, and where there is a meeting of the Board of Directors, and no action is taken, why is that admissible?

Mr. Kramer: It is admissible, if the Court please, to show that the Washington Board was not acting alone; that it was about to act and then decided that it would wait.

The Court: Where is there any evidence that they were about to act?

The Committee made a report, and the Board of Directors unanimously refused to adopt until they had heard from the National Association.

Mr. Kramer: If the Court please, I have some difficulty in answering that question, because the answer to

126 that is that the exhibit which you excluded, and the next one I didn't offer because of your previous ruling, would have shown that.

The Court: What do you think I excluded those other two for?

Mr. Kramer: I am not entirely clear. I had supposed it was because of the statute of limitations point.

The Court: You mean that memorandum?

Mr. Kramer: Yes.

The Court: No, that is not the reason I excluded it. I excluded it because in the first place we don't know who made it. It was, I suppose, prepared by some member of the Committee that attended that meeting, and a memorandum was made, and nothing else was done.

What was contained in that memorandum by the memorandum alone, that was not shown by the Government to have been adopted by the Washington Real Estate Board, and had no connection with the National Association, so for the present that has been excluded.

Mr. Kramer: Very well, your Honor.

The Court: And I suppose that that was the reason you didn't offer the exhibit prior to the meeting of the Board of Directors.

Mr. Kramer: That is correct.

If the minute said, "We will take no action," and stopped there, there would be no point in just wasting the
127 time of the Court, but because it says, the Government contends, that we won't act until after the National acts, it becomes a cardinal point in our charge between the two.

I was trying to refresh the witness' recollection, if there is any possibility of refreshing it. I think it has been.

By Mr. Kramer:

Q. The question I asked was, do you recall whether or not the Special Commission Study Committee reported to the Board of Directors of the Washington Board and recommended in May, 1939, that no action be taken in respect to a change in the Commission rates until after the National Association had opportunity to make its report?

Mr. Leahy: I object to the question. He is now trying to get in what your Honor has already excluded.

The Court: I will sustain the objection.

Mr. Kramer: Will you please mark this Government's Exhibit for Identification No. 16? That is the Progress Report, copy of which was handed to your Honor.

(Progress Report marked for identification Government's Exhibit No. 16.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 16 for identification and ask you in whose handwriting and what the handwriting is, the top right hand side of
128 the front page of that exhibit?

A. Naturally, my own signature, Mr. Kramer, having furnished this information to you.

Mr. KRAMER: Thank you. I do not offer this in evidence at this time.

The COURT: Very well.

Mr. WHITEFORD: What is that? The Progress Report?

Mr. KRAMER: That is right.

By Mr. KRAMER:

Q. This document is a copy of one taken from the files of the Washington Real Estate Board, is it?

A. Yes, sir.

Q. Mr. Rush, are you familiar with the signature of Boyd T. Barnard?

A. I think I am. I would assume that any letter carrying his signature would be authentic.

129 Q. Do you remember whether or not, in 1941, he was chairman of the Committee on Rates, Rules and Customs for the National Association of Real Estate Boards?

A. Mr. Kramer, may I say that I cannot remember exact dates. For 25 years I have been a secretary and I have had from 50 to 100 meetings a year so the dates I can refresh my memory.

The COURT: You say you know his signature?

The WITNESS: Yes, sir.

The COURT: Will you hand him the letter, please?

Mr. KRAMER: Will you mark this Government's Exhibit for Identification No. 17?

(Letter to Charles J. Rush, Executive Secretary, Washington Real Estate Board, dated June 16, 1941, from Boyd T. Barnard, Chairman, Committee on Rates, Rules and Customs of National Association of Real Estate Boards was marked Government's Exhibit 17 for Identification.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit No. 17 for Identification and ask you whether or not this signature appearing at the bottom of that letter is that of Boyd T. Barnard?

A. Yes, sir.

Mr. LEAHY: Wait a minute. May I cross-examine on that point, whether he knows Mr. Barnard?

The COURT: Do you object to this letter?

130 Mr. LEAHY: Yes.

The COURT: You are?

Mr. LEAHY: I beg your pardon?

The COURT: You are objecting to this letter?

Mr. LEAHY: No; I was objecting to the answer whether this was Barnard's signature that he just put in.

The COURT: You may examine.

Mr. LEAHY: Did you ever see Mr. Barnard write?

The WITNESS: No, Mr. Leahy, I would have to say no.

Mr. LEAHY: At no time have you ever seen him write his signature, have you?

The WITNESS: No, sir.

Mr. LEAHY: All you do is assume that that is his signature because it happens to be a signature of his name on that letter?

The WITNESS: That is correct.

Mr. LEAHY: So far as you know, his secretary might have written it?

The WITNESS: That is true.

Mr. LEAHY: I object.

Mr. KRAMER: Do you object to the letter?

Mr. LEAHY: You didn't ask him that. You asked him if he knew that was Barnard's signature and I object because he was answering on an assumption that businessmen make.

Mr. KRAMER: Mr. Barnard is to be a witness so

131 perhaps I should wait for him to identify his signature.

Mr. LEAHY: I thought you were offering Exhibit 17.

The COURT: The letter is Exhibit 17.

Mr. LEAHY: And 16 is the progress report of the Committee.

If the Court please, this is a little bit out of order but Mr. Whiteford says he knows Mr. Barnard's signature and I am willing to take his word on that.

Mr. KRAMER: I move that Government's Exhibit No. 17 be admitted in evidence, if your Honor please.

The COURT: Pardon me?

Mr. KRAMER: I move that Government's Exhibit No. 17 be admitted.

The COURT: You have no objection?

Mr. WHITEFORD: I have no objection provided there goes with it, in order that I may cross examine Mr. Rush at the

proper time, the Guide that is referred to in that letter because the letter is meaningless without the Guide.

Mr. KRAMER: I will withdraw the offer. I agree the suggestion is well taken. I apologize to counsel.

I ask that the Guide be marked Government's Exhibit 18 for Identification.

The Court: Are you referring to what was enclosed in the letter of June 16?

Mr. WHITEFORD: Yes, sir.

132 The COURT: That is the progress report which is the Guide, isn't it? The letter says, "We enclose two copies of the Guide"—I see the enclosure.

Very well, mark it 17-A.

(Guide on Rates, Rules and Customs of the National Association of Real Estate Boards was marked Government's Exhibit 17-A for Identification.)

Mr. WHITEFORD: I say that I have no objection to this on the ground of its authenticity nor do I doubt at all that Mr. Rush got it and got this Guide. I object to it from the standpoint of the statute of limitations; the Guide being enclosed in a letter dated 1941.

The COURT: After reading this letter, I don't see why you are objecting to it.

Mr. LEAHY: That is why I hoped he would recognize the signature.

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 17-A for Identification and ask you whether or not that was enclosed in the envelope containing the letter from Mr. Barnard to you marked Government's Exhibit No. 17 for Identification?

A. I have reason to believe that.

Mr. KRAMER: If your Honor please, I move that Government's Exhibits 17 and 17-A be admitted in evidence.

The COURT: There is no objection, I understand.

133 Mr. LEAHY: None, your Honor.

Mr. WHITEFORD: No, sir.

The COURT: They will be admitted.

(Letter to Charles J. Rush from Boyd T. Barnard, dated June 16, 1941, previously marked Government's Exhibit 17 for Identification, was received in evidence.)

(Guide on Rates, Rules and Customs of National Association of Real Estate Boards, previously marked Government's Exhibit 17-A for Identification, was received in evidence.)

Mr. KRAMER: I would like to read only one provision in 17-A. That is the provision on the top of page 9. I should read the heading at the bottom of page 8.

Mr. WHITEFORD: Mr. Kramer, may I suggest that you read the letter that accompanied this because it will be far more intelligible to the jury to understand what is being talked about.

Mr. KRAMER: All right.

Mr. WHITEFORD: In order that we get this clearly, I certainly want the jury to understand this is a letter written by Mr. Barnard of the National Association to Mr. Rush back in 1941 in which he encloses this Guide that I feel ought to go with it and from which you want to read.

Mr. KRAMER: I will be glad to read the letter.

Mr. WHITEFORD: That is the letter from the Na-
134 tional Association to Mr. Rush.

Mr. KRAMER (reading):

"Dear Mr. Rush:

"We enclose two copies of the Guide on commission rates, rules, and customs, prepared by the National Committee on this subject. We would appreciate your Board referring this schedule to some committee or officer interested in the matter of commissions who could compare it with your schedule, definitions and customs and give us the benefit of your comments and advice. If this Guide is out of line in any important point with your own practice, will you please advise us? If you think the Guide would be an improvement on your present practice, will you also let us know this fact?

"It is the purpose of our committee this year to try to perfect our guide and to bring the matter of improvement of local Board schedules before the delegates at the Detroit convention in November. Recent experiences with Government agencies and with important fiduciary institutions lead your Committee to feel that this subject is exceedingly timely and much good could be accomplished if our Member Boards could agree on certain basic definitions and procedures such as suggested in the Guide.

"In order to make reference to any particular section
easier, we have arranged the Guide on an alphabetical
135 basis. In commenting on any particular item, it
would save time if references were made to the point in question by number and letter.

"Your National Committee would also appreciate knowing whether your Board has recently revised its schedule and whether the Guide has been helpful in this process.

"It would be appreciated if you would respond to this letter within the next two or three weeks. Please send your replies care of Headquarters Office, 22 West Monroe Street, Chicago."

I will read from Government's Exhibit 17-A, pages 8 and 9. This is the Guide on Rates, Rules and Customs sent by the National Association with this letter and I am reading XVJ—Sales Commissions and Rules.

"All commissions shall be based on total values or sales prices of property and not on equities or partial payments.

"A. City Property:

"(Consisting of, or located on land which is within or contiguous to a municipality.)

"Commissions on the sale of improved or vacant property shall be not less than:

"5 percent on the first $100,000.

"3 percent on the next $400,000.

"2 percent on the balance.

136 "Minimum Charge $50 vacant; $100 improved."

By Mr. KRAMER:

Q. Mr. Rush, do you remember now whether the Special Commission Study Committee held any meetings in 1941 or 1942?

A. I will have to refer to this. One of the subpoenas which was issued to me asked for the minutes of the Commission Study Committee during, I believe, '41, '42 and '43, or '41 and '42; I don't know which. But there were no minutes of any committees. They were merely memorandums of all committees but there were no meetings during that period.

Q. The Special Commission Study Committee, so far as you now recollect, had no meetings in '41 and '42?

A. '41, '42 nor '43. We did not have any meetings of the Special Commission Study Committee at that time, as I recall.

Mr. KRAMER: I ask that this be marked as Government's Exhibit 18 for Identification.

Mr. WHITEFORD: What is that, the minutes of the Board of Directors held January 20, 1943?

Mr. KRAMER: The minutes of the meeting of the Board of Directors held January 20, 1943.

(The minutes of the meeting of Board of Directors held January 20, 1943, was marked Government's Exhibit 18 for Identification.)

By Mr. KRAMER:

137 Q. Mr. Rush, I hand you Government's Exhibit No. 18 for Identification and ask you whether or not that is a photostatic copy of minutes of a meeting of the Board of Directors held in the Board offices on January 20, 1943?

A. Yes, sir; but I cannot understand why it does not have my signature on the bottom. I must have failed to sign it as secretary.

Q. You would have signed it if it had been called to your attention that you had not signed it?

A. Yes. That is why I say I cannot understand why the signature is not there.

Q. You generally signed minutes, is that right?

A. I always signed the minutes.

Mr. KRAMER: I move the admission of Government's Exhibit No. 18 for Identification in evidence, your Honor.

Mr. LEAHY: We object, if your Honor please, on the ground there is no proof. As I understood, that was a minute—

Mr. KRAMER (interposing): I didn't hear your objection.

Mr. LEAHY: Did he say he could identify them as the minutes?

Mr. KRAMER: He said they were the minutes.

The WITNESS: They appear to be a copy. I said I don't know why my signature was not on there.

Mr. LEAHY: You feel sure they are the minutes?

The WITNESS: I am satisfied they are.

138 Mr. LEAHY: I have no objection except as to the statute of limitations.

Mr. WHITEFORD: May I ask if that minute entry of January 20, 1943, refers to the proof of this schedule of commissions, so-called, revised February 16, 1943?

The WITNESS: I will have to look at those minutes to answer that because there was no Commission Study Committee meeting but the 1943 changes came through the Brokers Committee.

Mr. KRAMER: If the Court please, I would like to ask counsel if he has in his hand a copy of the schedule of commissions that were in effect in 1943? If he does, we would certainly like to have it. I tried to put it in evidence before and Mr. Rush could not identify it.

Mr. WHITEFORD: What I am trying to find out is whether this minute entry of the Board you contend supports and is the action of the Board fixing the so called schedule of commissions of February 16, 1943?

Mr. KRAMER: We do not make any contention at all with respect to that. We are trying to get a copy of the schedule of commissions in effect at the time so we can put it in evidence.

Mr. WHITEFORD: January 20, 1943, was the date of the minute of the Board entry and I thought that you had it. Do you have a schedule of commissions in here of the local board?

139 Mr. KRAMER: I had what I thought was a copy but Mr. Rush was unable to identify it.

The COURT: All that Government's Exhibit 18 can show is that the Board adopted a recommendation of the Brokers Committee relative to the elimination of the commission boundary zone which was approved January 28, 1943, where they abolished the distinction between suburban and city areas and then made the Commission for the sale of all real property in the District of Columbia and the adjacent metropolitan area 5 percent of the first $50,000 and 3 percent of the amount above.

Mr. WHITEFORD: That is all right. I was trying to see how it tied up with other papers we have here.

The COURT: It may be admitted.

(Minutes of meeting of Board of Directors held January 20, 1943, previously marked Government's Exhibit 18 for Identification, was received in evidence.)

Mr. KRAMER: If the Court please, if counsel has a copy of the schedule of commissions in his hand now that was in effect prior to this meeting, we would like to have it.

Mr. WHITEFORD: I haven't that.

Mr. LEAHY: We haven't that. We have the schedule that was adopted in February, 1943.

Mr. KRAMER: That is the only one you have?

Mr. LEAHY: Yes.

Mr. WHITEFORD: That is why I was wondering if
140 this minute entry was behind that.

Mr. KRAMER: We will bring that out.

I will read now to the jury the relevant portion of Government's Exhibit No. 18:

"The recommendation of the Brokers Committee relative to elimination of the Commission Boundary Zone as follows was read by the secretary:

"'Your Brokers Committee, after due consideration, for the reasons cited below, respectfully suggest the elimination of the boundary line distinguishing "suburban" and "city area" in so far as payment of commission on the

sale of real property is concerned, and recommends the adoption of a change in the commission schedule, as follows:

"'The Commission for the sale of all real property in the District of Columbia and adjacent Metropolitan area, shall be 5 percent of the first $50,000 of purchase price, and 3 percent on the amount above.

"'The Committee also recommends as an additional revision in the commission schedule the following:

"'The minimum commission to be charged for the sale of real property shall be $100.

"'The minimum commission on all sales of real estate within the District of Columbia shall be 5 percent of the sales price up to and including $50,000 and 3 percent
141 on the excess above $50,000, and in the adjacent Metropolitan area in Maryland shall be at a minimum of 5 percent.

"'The minimum commission for any sale shall be $100.'

"The Chair put the question and the motion was unanimously adopted.

"Modifications of the exchange commission schedule were then considered and the following changes were duly approved:

"'In the exchange of real estate a commission shall be charged each owner at the rate of 2½ percent of the exchange price of the lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 5 percent up to and including $50,000, and 3 percent for the amount above $50,000 if located within the District of Columbia. Where the property is located in the Metropolitan Area in Maryland the owner of the higher valued property shall be charged a commission of 5 percent on the excess, each party to the exchange paying 2½ percent on lower valued property.'"

Mr. WHITEFORD: If your Honor please, there is a reservation that I think I should make with respect to that letter so far as the National Association is concerned which will grow out of the cross examination that I must neces-
142 sarily make of Mr. Rush.

I think that the action of the Board of Directors of the local association is probably admissible so far as the local association is concerned but I call Mr. Kramer's attention to the fact there is no showing as to the National Association in any way and so that I would like to know which

you would prefer me to do, cross examine Mr. Rush about that now or wait until I cross examine him on all of it and move to strike?

The COURT: I think at the present time it is only admissible as against the Washington Real Estate Board for whatever value it has and you may cross examine when Mr. Kramer is through.

Mr. WHITEFORD: Yes, sir.

Mr. KRAMER: Will you mark this Government's Exhibit for Identification No. 19?

The COURT: What is that, the notice that was sent out?

Mr. KRAMER: That is right, sir.

The COURT: What value is that?

Mr. KRAMER: We want to show it was regarded as very important by the Washington Board.

The COURT: It was approved by the Board of Directors. What you have set out was adopted by the Board?

Mr. KRAMER: And now we want to show the matter was put up to the whole membership for vote. That is the crux in our case.

143 The COURT: All right. Go ahead.

(Special notice to all active members from the Washington Real Estate Board, dated January 22, 1943, was marked Government's Exhibit 19 for Identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 19 for Identification and ask you if that is the notice that you sent out to every member of the Washington Real Estate Board in January, 1943?

A. This is a copy of the notice but it was mailed to active members. We have active member officers numbering approximately 250. It did not reach each and every individual member of the Board.

Q. So it went out only to the 250 active members?

A. Active member officers. We qualify our members that way.

Q. This is your signature at the bottom of the exhibit, is it?

A. Naturally.

Mr. KRAMER: If the Court please, I move the admission of Government's Exhibit 19 for Identification in evidence.

The COURT: Very well. It may be admitted.

(Special notice to all active members of the Washington Real Estate Board, dated January 22, 1943, previously marked Government's Exhibit 19 for Identification, was received in evidence.)

144 Mr. KRAMER: I would like to point out to the jury, unless there is objection, this was a notice sent to each active member of the Washington Real Estate Board marked "Important" at the top left-hand corner.

Mr. WHITEFORD: That too is admissible against the Local Board and not the National Association.

The COURT: That is correct.

By Mr. KRAMER:

Q. Mr. Rush, following your sending to each active member of the Washington Real Estate Board Government's Exhibit No. 19, being the notice, did you receive any communications from members of the Board opposing the change in rates?

The COURT: That is excluded.

Mr. KRAMER: On what ground, if your Honor please?

The COURT: It has no bearing on this case at all what a certain member of the Board thought. Therefore, this letter from Woodward and this letter from Kass are out.

Mr. KRAMER: May I be heard, if your Honor please?

The COURT: No, you may not be heard. You know that is not proper and don't you put it in. The opinion of an individual member of Washington Real Estate Board expressing their opposition to raising the rate is not admissible.

Mr. KRAMER: We charge they are co-conspirators, your Honor.

The COURT: I have made my ruling.

145 Mr KRAMER: Excuse me, your Honor. I am sorry I pressed you.

Will you mark this Government's Exhibit No. 20?

(Minutes of Special Meeting of the Washington Real Estate Board held February 16, 1943, were marked Government's Exhibit 20 for Identification.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 20 for Identification. I ask you whether or not it is a photostatic copy of the minutes of a meeting of the Washington Board which you prepared?

A. Yes, sir; it is a photostat copy of the minutes of a special meeting of the Board.

Q. The minutes of a meeting of the Board?

A. Minutes of a meeting of the Board, yes, sir.

Q. Did you prepare those minutes?

A. Yes, sir.

Mr. KRAMER: The date of the minutes is February 16, 1943.

If the Court please, I move the admission in evidence of Government's Exhibit 20 for Identification.

The COURT: Very well. It may be admitted.

(Minutes of Special Meeting of Washington Real Estate Board, dated February 16, 1943, previously marked Government's Exhibit 20 for Identification were received in evidence.)

146 By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 20 for Identification and I call your attention to the first full paragraph on the last page of the exhibit.

Mr. WHITEFORD: Are you referring to Exhibit 20?

Mr. KRAMER: That is right.

Mr. WHITEFORD: Those are the minutes of the special meeting of the full Board, is that it?

Mr. KRAMER: That is right. I have offered it in evidence and his Honor admitted it.

Mr. WHITEFORD: I understand this too is admitted only as against the Local Board and not the National Association.

The COURT: What paragraph do you want him to read?

Mr. KRAMER: The first full paragraph on page 3.

The COURT: You want him to read "The motion providing for a 4 percent overall rate died for want of a second"?

Mr. KRAMER: That is right.

The COURT: What possible bearing could that have?

Mr. KRAMER: I want to ask who made the motion?

The COURT: What difference would that make?

Mr. KRAMER: This is an action of the whole Board, your Honor, and not the Board of Directors.

The COURT: What is the question?

Mr. KRAMER: The question is: Do you remember now who made the motion providing for the 4 percent overall rate?

147 Mr. LEAHY: I object to it.

The COURT: Sustained.

By Mr. KRAMER:

Q. Mr. Rush, I call your attention to references in the exhibit to Article 14 and Article 17 in the next paragraph on the last page. My question is: Is that a reference to the Constitution and By-laws of the Washington Board?

A. Yes, sir.

Mr. KRAMER: I would like to read this exhibit to the jury, if your Honor please.

The COURT: Are you going to read the whole of it?

Mr. KRAMER: I think the entire exhibit is relevant, I would be glad to eliminate—

Mr. LEAHY (interposing): We object to the paragraph the Court has just excluded.

Mr. KRAMER: I didn't understand the Court had excluded any paragraph in this exhibit, if your Honor please.

The COURT: I excluded any reference to a motion which died because of want of a second.

Mr. KRAMER: We will cut out that paragraph.

Do you want me to offer parts of these documents?

The COURT: No. The document has been offered but I think if you are going to read it to the jury you ought to read those pertinent parts on which you are depending to establish your case. This is going to be a long case.

148 There are a lot of exhibits and I see no reason putting in that that has nothing to do with the case at all.

Mr. KRAMER: I want to say to your Honor, though I may not have been successful, ever since yesterday afternoon I gathered we would have to hurry up.

The COURT: I don't mean to hurry you to the point where it is going to interfere with the orderly progress of your case but if you want to read the whole exhibit, go ahead.

Mr. KRAMER: Naturally I won't read the part your Honor has excluded or the part referring to the Navy.

"Minutes of Special Meeting of the Washington Real Estate Board, held in the Ambassador Hotel, Tuesday, February 16, 1943, 2 p. m.

"Present: President Livingston, First Vice-President Phillips, William L. Beale, Edward R. Carr, Frank S. Phillips, L. T. Gravatte, Joseph A. Herbert, Jr., Frank M. Doyle, O. M. Walker, J. Lee Donnelly, J. B. Bowling, Charles C. Koones, F. Eliot Middleton, Edward H. Brent, F. A. Murray, George R. Linkins, William A. Hill, John H. Davidson, A. C. Houghton, B. H. McCeney, George Wise Worthington, III, Thomas L. Phillips, Owen Hohenstein, E. H. Croxton, R. V. Marceron, F. W. Stoyer, G. Calvert Bowie, Thomas V. Lewis, Gilliat & Company, Mrs. Chase (Laura Harlan Company), Frances Powell Hill, J. Wesley Buchanan, J. Garrett Beitzell, A. Caspar Moore,

149 Thomas W. Sandoz, C. H. Hillegeist, C. Allen Sherwin, Jack Hayes, L. F. Colbert, H. Glenn Phelps and others.

"The Chair called the meeting to order at 2:15 p. m., stating that the Board of Directors had adopted the report of the Brokers Committee recommending that the present commisson boundary zone be eliminated and that in compliance with their action the meeting had been called in order that the members could consider the proposed changes.

"Mr. Sandoz, Chairman of the Brokers Committee, was called upon to read the Committee's report, which provided for the elimination of the commisson boundary zone; the adjustment of the commission rate to provide for a commission of 5 percent up to $50,000 and 3 percent on the excess above $50,000 on all sales in the District of Columbia and adjacent Metropolitan Area; a minimum sales commission of $100; and an adjustment in the exchange commission rates to conform.

"After reading the report, Mr. Sandoz duly moved its adoption, which was seconded by Mr. McCeney. The subject was generally discussed, it being agreed that the boundary zones should be eliminated as being inequitable and unfair to owners of property located adjacent to the boundary lines which placed them in the higher rate area, as well as the cause of much confusion on the part of property owners and brokers.

"Mr. Bowie offered an amendment to set the ceiling on the 5 percent rate at $25,000, which was seconded by Mr. Bowling but failed of passage."

I don't think the next paragraph is relevant, if your Honor please, because it does not relate to the District of Columbia.

The Court: Very well.

Mr. Whiteford: It is relevant in that it failed to pass.

Mr. Kramer (reading):

"The secretary then read the amended motion as follows:

"'Your committee submits that conditions have changed to such an extent since 1917 that the lower commission rate charged on property within the old "City Proper" area is unfair and inequitable, causes embarrassment and confusion among owners and brokers, and has in many cases caused bad feeling among owners, who, while not objecting to a 5 percent commission rate, see no reason why they should be charged more than their friend whose property might be a block or less away.

"'We further submit that the broker's main stock in trade is his time, and that the sale of a "downtown" prop-

erty, except for possibly a few minutes in "showing time", consumes the same amount of time and effort in completing the transaction through settlement as does
151 the sale of a property in the outlying sections.

"'Your committee mentions that which is common knowledge, namely the greatly increased costs of doing business, which costs have steadily increased over the years and give every indication of continuing to do so in the years to come.'

"'The real estate brokerage office operating on a fixed commission basis, is in the unenviable and unfair position of being forced to absorb itself all of the increased costs, and, while at present, there has been a good volume of business, we submit this condition is temporary, unusual, and cannot be relied upon to continue. Also, clients of brokerage offices are receiving, without charge, services which the public has never received before; namely, advice, guidance, and in many cases physical effort, in the compliance with the Rent Control Act and the Fuel Oil Rationing Act.

"'Lastly, we submit there is no legitimate reason why the commission rate in Washington, D. C., which has been well described as the Capital of the World, should not be comparable to those rates charged by other large cites, the rates of which are shown below:

Philadelphia—5 percent straight—no ceiling.

St. Paul—5 percent straight—no ceiling.

Syracuse, New York—5 percent straight, 8 per-
152 cent beyond 7 miles from center of city.

Chicago—5 percent to $100,000—3 percent above.

Kansas City—5 percent to $100,000—3 percent above.

Columbus, Ohio—5 percent to $100,000—4 percent above.

"'It will be noted that the suggested change eliminates the theoretical boundary line but at the same time fixes the District of Columbia rate a great deal more favorable to the property owner than in any city above named.'

"The subject was generally discussed as well as the proposed $50,000 ceiling. An amendment was offered by Mr. Breuninger to the motion of Mr. McConihe for the adoption of the report providing for a $25,000 ceiling but this was rejected by a majority vote."

I am skipping the next paragraph.

"Secretary stated that the Board's rules 'Article 14' and 'Article 17' provide that a written notice be mailed to every

active member at least ten days prior to the meeting, said notice to contain the substance of the proposed amendment, and that said notice would be sent without delay."

That is all the minutes that I will read, your Honor.

153 By Mr. KRAMER:

Q. Mr. Rush, following the action of the Washington Board at this special meeting, did you send a notice to every active member of the change in commission rates adopted by the Board?

A. I believe that I did.

Q. You attempted at least to do so?

A. I tried to keep our members fully informed, but I would have to look at the records to check.

Q. Did the constitution and by-laws of the Washington Board require you to do that?

A. I don't see how—it didn't come right out and say, do it, but the rules say the membership should be advised of all meetings, and I don't know just exactly what this pertains to in there, except unless the question may have come up from the floor as to, was a notice sent to all members? I just don't understand the phrasing in there as to why that would come up, because there was not to be another meeting. The meeting had been held that day, so that is vague in my memory.

Q. At any rate, so far as you now recall, you did notify the members after the meeting of the change in the schedule of commissions, is that right?

A. Yes, sir,—of the elimination of the commission boundary zone.

Q. I didn't ask you that, sir. I asked you whether
154 or not you sent notice of the change in the scheduled commissions to each member of the Washington Board.

Mr. LEAHY: I object to the attitude of counsel. Notice probably included what Mr. Rush said.

The COURT: Objection sustained.

Mr. LEAHY: Don't act like you are going to eat him up.

Mr. KRAMER: Do you have a copy of the notice?

Mr. LEAHY: You have just exhibited it.

Mr. KRAMER: I am referring to a copy of the notice that was sent to the members after the schedule of commissions was changed.

Mr. LEAHY: Let me look. If I have anything in that respect I will be happy to give it to you.

I just say that, if your Honor please, because I happen to know personally this man is just out of bed with a heart attack, and I don't want him to collapse on the stand.

The COURT: Yes. We will conduct this trial in an orderly fashion, and counsel will not shout at any witness.

Mr. KRAMER: I apologize for shouting, if the Court please.

The COURT: Very well. We will take a 10-minute recess.

(Thereupon a short recess was taken.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you a copy of Government's Exhibit No. 17 A, being the Guide on Rates, Rules, and Customs. I show you page 10 thereof and ask if that refreshes your recollection that a member of the Washington Real Estate Board was on the Committee on Rates, Rules, and Customs, of the National Association in 1941?

155

A. Naturally; Mr. Bangs is a member of the Washington Board, and his name appears here.

Q. Is that the first time you knew it, Mr. Rush?

A. I can't state definitely, no; you know he has been on so many National Boards. Mr. Bangs was Chairman of the Brokers Institute. He has been a National Director, and he was my first President when I became Secretary of the Board in 1932, so I wouldn't know when he was on the Committee, or on the Committee of Member Appraisals, Governing Council, and all of these things. He is one of our members, and we are proud of him.

Mr. LEAHY: I might interrupt for a moment.

Mr. Rush, didn't you and I hunt for that notice which Mr. Kramer asked for just before the recess?

The WITNESS: Yes, sir.

Mr. LEAHY: I thought I had it, but I don't seem to locate it.

Mr. KRAMER: You can go on, and whenever we find it—

The WITNESS: Isn't there an envelope there, sir?

Mr. LEAHY: Here is an envelope, yes (handing envelope to the witness).

156

Pass that to the witness, Mr. Clerk, and see if he can identify that.

The WITNESS: Yes, this is the notice I was looking for.

Mr. KRAMER: May I have it, please?

Mr. LEAHY: Yes, certainly.

(Witness hands document to Government's Counsel.)

Mr. KRAMER: May this be marked Government's Exhibit 21 for identification?

The COURT: I don't have it here.

Mr. KRAMER: I don't have it either, your Honor; I am sorry (handing document to the Court).

(Document entitled Special Bulletin, Washington Real Estate Board, February 17, 1943, marked for identification as Government's Exhibit No. 21.)

Mr. KRAMER: If your Honor please, I move the admission of Government's Exhibit No. 21 for identification in evidence.

The COURT: Very well.

(Document heretofore marked for identification received in evidence as Government's Exhibit No. 21.)

Mr. KRAMER: The only part I want to read is the first paragraph thereof:

"Special Bulletin, Washington Real Estate Board, 1417 K Street, Northwest. February 17, 1943.

"Placing the entire District of Columbia into one commission zone was accomplished this week when mem-
157 bers of the Washington Real Estate Board formally agreed to the elimination of the two commission boundary zones which have been in existence for more than twenty years. The changes were adopted February 16, 1943."

Mr. LEAHY: May I read one bit more to the jury, if your Honor please?

Mr. KRAMER: Certainly.

Mr. WHITEFORD: It is understood that is admissible only against the Local Board, isn't it?

Mr. LEAHY: (Reading) "Adjustments were made in the existing commission schedule placing a minimum rate of 5 per cent on property valued up to and including $50,000, and a 3 per cent rate on the value in excess of $50,000. This amounts to an equalization for the entire District of Columbia, and will aid in eliminating the many misunderstandings which have come up through lack of definite information as to the dividing lines in the former commission zones. No changes were made in the schedule applying to properties located in the Maryland metropolitan area, which is under the jurisdiction of the Washington Real Estate Board."

By Mr. KRAMER:

Q. Mr. Rush, were further changes in the rates or schedule of commissions established by the Board made after the change in 1943?

158 A. There was a meeting in 1944, at which adjustments were made, or modifications in the schedule, but in my judgment, and I have stated that for you and

Mr. Maletz in the past, that these were modifications or clarifications, not increases in the rates.

Q. Your answer to my question then is yes, is that it?

A. Yes, December 19, 1944.

Mr. KRAMER: Thank you.

I offer in evidence Government's Exhibit for Identification No. 22.

The COURT: You are offering it?

Mr. KRAMER: I ask that it be marked; excuse me, your Honor.

The COURT: What is that?

Mr. KRAMER: That is the special notice to active members.

(Special notice to active members dated marked for identification Government's Exhibit No. 22.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit No. 22 for identification and ask you if you recognize the signature on the bottom of the second page of that memorandum?

A. That is the signature of Francis A. Murray, who was Chairman of the Committee at that time.

159 Q. What was the name of the committee of which he was chairman?

A. I don't know that we set up any committee specially named. It could be the Commission Study Committee as well as any other committee, Mr. Kramer, but I do not recall of any special designation except if a special committee consisted of the chairmen of the various committees in the Board.

Q. The chairman of some committee, but the precise one you wouldn't remember now? Is that your answer?

A. These were made up of the chairmen of various committees, but the committee's particular name, I can't testify to that; I can't recall it.

Q. But it was a committee in 1944 that was studying this question of clarification—

A. Yes, sir.

Q. —and of the schedule of commissions?

A. Yes, sir.

Mr. KRAMER: If your Honor please, I move the admission in evidence of Government's Exhibit 22 for identification.

Mr. LEAHY: We object to it, if your Honor please, for several reasons. First of all, what it says: "Revised Rule 1," there is nothing mentioned in the indictment in regard to that.

Mr. KRAMER: That is correct, your Honor.

Mr. LEAHY: That is an internal matter between the
160 brokers themselves—

The COURT: This is a letter sent out by Mr. Murray to the active members asking for their recommendations, with no action taken one way or the other by the Board; is that correct?

Mr. LEAHY: That is correct.

Mr. KRAMER: If your Honor please, it is not. We are going to show in due time that the Board did act.

The COURT: I will admit that, but I will sustain the objection, and this will be excluded.

Mr. KRAMER: If your Honor please, I would like, if you don't mind, to state the limited purpose for which it is offered, and why we are offering it.

We are offering it for the limited purpose of showing that the members of the Washington Board were consulted prior to making any changes in the schedule of commissions. I take it your Honor still excludes Government's Exhibit 22?

The COURT: That is correct.

(The document heretofore marked for identification was offered in evidence as Government Exhibit 22, and excluded by the Court.)

Mr. KRAMER: If your Honor please, I ask that this be marked as Government's Exhibit No. 23 for identification.)

(A document entitled Schedule of Commissions and Fees
161 Adopted by the Washington Real Estate Board as standard for its members, attached to special notice to active members, December 5, 1944, marked Government's Exhibit No. 23 for identification.)

Mr. KRAMER: Mr. Whiteford and Mr. Leahy, do you have what I am referring to?

Mr. LEAHY: Is that Government's Exhibit 23?

Mr. KRAMER: That is right.

By Mr. KRAMER:

Q. I hand you Government's Exhibit 23, Mr. Rush, and ask you if your signature appears on the bottom of the first page of that exhibit?

A. That is my signature, sir.

Q. Is that a copy of a special notice to active members that you sent out in December, 1944?

A. Under date of December 5, 1944, notification of a meeting.

Q. Do you remember it now; do you have any independent recollection generally of what happened about that time about the schedule of commissions?

A. This was a notice of a meeting to be held December 19, 1944—

Q. Excuse me, Mr. Rush; my question is, do you now have an independent recollection, without referring to that document, generally of what happened at the meeting of which that is a notice?

162 A. Generally speaking, yes, sir.

Q. Do you remember that you told the members that further increases in rents were not being considered at that time?

A. I did not read the statement, but I still feel that I did tell them that it was not an increase in rates, if was an adjustment and modification.

Q. I am speaking now of 1944 and 1944 alone.

A. Yes, sir.

Q. My question is, do you recall, informing the membership—if you don't recall, of course that is all you can say—do you recall informing the members that the Board did not contemplate proposing further increases in rates?

A. Sounds like my words, Mr. Kramer, but I can't remember that.

Q. Looking at the pages on Government's Exhibit 23 for identification, after the first page, I will ask you whether or not that is the inclosure that was sent out, the first page, to every active member of the Washington Board?

A. That appears to be a copy of the notice which was mailed to our members.

Mr. KRAMER: If the Court please, I move the admission in evidence of Government's Exhibit 23 for identification.

The COURT: Very well.

163 (The documents heretofore marked for identification received in evidence as Government's Exhibit No. 23.)

Mr. LEAHY: You are not going to read the whole thing?

Mr. KRAMER: No.

Mr. LEAHY: There is much in there that doesn't have to do with—

Mr. KRAMER: That is correct. I am only going to read that portion which commences with Section 3, "Leases-Business Property."

First I would like to read the first three paragraphs of the notice, which is page 1, dated December 5, 1944:

"Special Notice to Active Members of Washington Real Estate Board, 1417 K Street, Northwest. December 5, 1944.

"Notice is hereby given that a special meeting of active members of the Washington Real Estate Board is being called by the Board of Directors to consider changes in the Schedule of Commissions and in the Rule for the Division of Commissions.

"The meeting will be held on Tuesday, December 19, 1944, at 2:30 p. m., in the Empire Room of the Ambassador Hotel. Each member office is entitled to one vote in accordance with the By-Laws.

"Enclosed with this notice is a copy of the changes, which were recommended to the Board of Directors
164 by the Special Committee, which made a study of recommendations made by the Brokers, Business Property Leasing, Property Management and Mortgage and Finance Committees, as well as those submitted by members in response to the Committee's request under date of July 7, 1944. A copy of the proposed schedule was sent to you at that time."

Section 3 in the enclosure sent with the notice reads as follows:

"For negotiating and making leases where rents are not collected by the broker and property is not under his management, and there is no managing agent, charges shall be made as follows:

"1. Monthly tenancy: One-half of first month's rent.

"2. Leases: One year: Five per cent.

"3. Leases—Term: First year five per cent. Next 20 years 2½ per cent. Next 21 years 1 per cent. Next 21 years ½ per cent. Any period beyond ¼ per cent."

By Mr. KRAMER:

Q. Mr. Rush, do you remember now what the standard schedule of commissions adopted by the Board on a 21-year lease of business property, where the agent did not
165 manage the property or collect the rent, was?

A. I think the copy of the Commission's schedule for 1943 shows we had two peculiar situations in leases—

Mr. KRAMER: Will you excuse me a minute? If the Court please, can't we have the witness answer only the question? He will have a chance on cross examination.

The COURT: I thought he was your witness. Isn't he?

Mr. KRAMER: I think he has shown sufficient hostility at this time to assume it is cross examination. I can't possibly talk to him. I have never talked to this man at all except in the presence of his counsel.

The Court: What is the question?

(Pending question read.)

The Court: When do you mean?

Mr. Kramer: Prior to this change.

The Witness: Prior to that change, I said before, and I repeat it again, sir, there were two different situations which were conflicting—

The Court: Mr. Rush, just answer the question, will you?

The Witness: Yes, sir.

The Court: What was the commission?

The Witness: The commission was 5 per cent on the first year and up to 21 years 2½ per cent. Then on the next paragraph it was 2½ per cent of gross rental for the first 21 years.

The Court: That was prior to the time of this meeting.

166 Mr. Whiteford: I wish somebody would explain that to us; I don't think the jury themselves understand it, and I think Mr. Rush was attempting to answer it.

The Court: I think after the witness has answered any question if an explanation is necessary he may give it. So I would prefer to have it that way, rather than have the explanation given first.

Q. Give your answer first, and then if you have an explanation you may give it.

You say that what you have just said was in existence prior to the time—

The Witness (interposing): December 19th.

The Court: —when these changes were adopted; that is correct, is it?

The Witness: Yes, sir.

The Court: Now, you may explain your answer. You have just given your answer as to what the rates were that were in effect prior to that time. You may now explain it.

The Witness: Under that leasing for business properties we had a one-year lease, 5 per cent.

Then there was the lease—why we ever wrote it this way I can not understand, but this is the way it was for many years—leases, first year 5 per cent and thereafter up to 21 years 2½ per cent of gross rental for term of lease.

Then the next paragraph came:

167 "Long-term leases 2½ per cent of gross rental for the first 21 years; 1 per cent for next 21 years," and so on.

We had had innumerable conflicts, wondering which was the schedule of the Board, and so that was brought in for the meeting December 19, 1944, to clarify and eliminate that, and it was done by putting 5 per cent on the first year and 2½ per cent on the next 20 years.

By Mr. KRAMER:

Q. Whereas under the prior schedule on a 21-year lease it was 2½ per cent on the first year and on the next 20 years as well, is that it?

A. That is right, on the long-term lease.

Q. On the long-term lease, that is all I am speaking about.

A. Yes, that is right.

Mr. KRAMER: Skipping the next document in your Honor's book, I ask that you mark this as Government's Exhibit 24 for identification, Mr. Clerk.

(Special notice to active members, Washington Real Estate Board, December 20, 1944, marked for identification as Government's Exhibit No. 24.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 24 for identification, and ask you whether or not that is
168 your signature on the second page of that document?

A. Yes, sir.

Q. Is Government's Exhibit No. 24 a notice that you sent out to all active members of the change in the schedule of commissions which was made on December 19, 1944, by the Washington Board?

A. Yes, sir.

Mr. KRAMER: If the Court please, I don't care to read any but the first paragraph of this exhibit.

The COURT: Very well.

Mr. KRAMER: My associate tells me I have not yet moved the admission of Government's Exhibit No. 24 in evidence.

The COURT: You just moved it; you wanted to read the first paragraph.

Mr. KRAMER: I thought I had, too, but I wanted to be sure.

The COURT: Very well, it may be admitted, and you may read the first paragraph.

(Document heretofore marked for identification received in evidence as Government's Exhibit No. 24.)

Mr. KRAMER: "Special Notice to Active Members:

"At a special meeting of active members of the Washington Real Estate Board, held Tuesday, December 19,

1944; notice of which had been mailed to all members, action was duly taken to modify several sections of the
169 present schedule of commissions and the rules for the division of commissions."

The notice then goes on to tell what those changes are. I don't care to read them to the jury at this time.

The COURT: Very well.

Mr. KRAMER: Please mark this Government's Exhibit 25 for identification.

(Schedule of Commissions, Washington Real Estate Board, revised to December 19, 1944, marked for identification as Government's Exhibit No. 25.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 25, and ask you whether or not that was prepared by or on behalf of the Washington Real Estate Board?

A. Yes, sir, it was.

Q. Did you send a copy of Government's Exhibit 25 to every member of the Washington Board after it was printed in December, 1944, every active member?

A. I do not recall. I assume that I might have, but I do not recall definitely.

Q. Well, is this a copy of the schedule of commissions revised to December 19, 1944, of the Washington Real Estate Board?

A. Yes, sir.

Q. And is this document a copy of the document
170 that you have since December 19, 1944, been handing to every member as he gets elected to membership in the Washington Board?

A. Yes, sir.

Mr. KRAMER: I move the admission in evidence of Government's Exhibit 25 for identification.

The COURT: Very well.

(Schedule of commissions revised to December 19, 1944, received in evidence as Government's Exhibit No. 25.)

Mr. KRAMER: If the Court please, I would like to read only Section 1, paragraphs 1 and 4, and the introduction:

"Washington Real Estate Board. Commissions and Charges. Schedule of Commissions and Fees Adopted by the Washington Real Estate Board as Standard for its Members.

"Section 1. Sales:

"1. The standard commission on all sales of real estate within the District of Columbia shall be 5 per cent of the

sales price up to and including $50,000 and 3 per cent on the excess above $50,000.

"4. The minimum commission on sales of property shall be $100. When property is unimproved and the sales price is less than $1,000, the amount of the commission charged shall be by agreement, not to exceed $100. All commissions shall be based on total value or sales prices of
171 properties and not on equities or partial payments."

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 5, which is the Code of Ethics of the Washington Board, and call your attention to Section 3, paragraph 1 of that exhibit, and ask you whether or not that paragraph, so far as you can recall, has been in the Code of Ethics of the Washington Board at all times since you became Secretary of the Board in 1932?

Mr. WHITEFORD: Which paragraph is that, Mr. Kramer?

Mr. KRAMER: Section 3, or paragraph 1, "Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates."

A. I can not answer that yes or no, because I do not have the 1931 copy available.

By Mr. KRAMER:

Q. The 1931 copy of what?

A. Of the Code of Ethics.

Mr. KRAMER: Does counsel have it in the room? I guess we have it, the document that I withdrew.

Mr. WHITEFORD: What was the year, 1931 Code of Ethics for the Washington Board?

Mr. KRAMER: The question is whether that provision has been in the Code of Ethics of the Washington Board at all times since he became secretary of the Board.

Mr. LEAHY: I object to that, if your Honor please,
172 as going away back to 1931.

The COURT: He said he couldn't answer it anyway, didn't he?

Mr. KRAMER: No, he said he could answer it if he were given the opportunity to see the document.

The COURT: Well, I will let him answer it.

A. There has been no change. I qualify that, in that period.

By Mr. KRAMER:

Q. I meant in that period.

A. That is correct.

Q. According to the rules of the Washington Board, is it ethical or proper for members of the Washington Real Estate Board to solicit business at rates less those established in the Schedule of Commissions?

A. You want a straight yes or no answer, and I can't give you yes or no.

Q. Make any explanation that you care to if it relates to the question.

A. The rules state that—or the rules which were modified following the indictment, that section—

Mr. LEAHY: I object to anything following the indictment.

Mr. KRAMER: All right, your Honor. I move to strike it.

The COURT: I will sustain that.

Mr. KRAMER: You can only talk about what happened prior to the indictment.

173 The WITNESS: The former rules provided that it was not ethical to solicit business in normal instances. Now, there were many cases where the question was not normal: The sale of a subdivision, or a group of houses, veterans' homes, and so on, and special rates were made in that instance, in most cases.

By Mr. KRAMER:

Q. Your answer then, I take it, is that in normal cases it was not ethical or proper for brokers who were members of the Washington Board to solicit business at rates lower than those established in the Standard Schedule of Commissions?

A. I would say yes.

Mr. KRAMER: We will skip the next several documents, your Honor.

By Mr. KRAMER:

Q. Do you recall from time to time, Mr. Rush, that members of the Washington Board would write you requesting your advice with respect to the schedule of commissions that would be applicable to a particular situation?

A. Yes, sir; having been rather a Father Confessor for 25 years for this organization why they lean on me for some things.

Q. And you made every effort, I take it, to reply to their questions if you knew the answer?

174 A. I did, outside of legal answers.

Q. Prior to August, 1947, did the Washington Board draw up and issue a standard form of sales con-

tract for use of those of its members who desired to use it?

A. Yes, sir, we have drawn up a number of sales contracts since 1932.

Q. Prior to August 27, 1947?

A. Yes, sir, prior to August, 1947.

Mr. KRAMER: I ask that this be marked Government's Exhibit No. 26 for identification.

(Form of sales contract, Washington Real Estate Board, marked for identification Government's Exhibit 26.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit 26 for identification and ask you if this is a copy of one of those forms of sales contracts that was drawn up by the Washington Board?

A. I assume that it is. It carries "Copyrighted by Washington Real Estate Board, printed by the Paragon Press", but I have not checked each item in the contract.

Mr. KRAMER: Does the Clerk have the stipulation that counsel entered into at the beginning of the case? I would like to check it to see if this has been stipulated.

The COURT: Yes, there was a contract, standard form of Washington Real Estate Board.

175 Mr. KRAMER: I think it would be better, your Honor, if I hand this piece of paper to counsel for the defendant and ask them if that is the one they meant to stipulate the authenticity of (handing document to defense counsel).

176 Mr. KRAMER: Is this the document that you intended to stipulate the authenticity of?

Mr. LEAHY: Yes; we will stipulate that that is a contract form copyrighted by the Board.

By Mr. KRAMER:

Q. Was this prepared by the Washington Board?

A. The only answer that I can give you, sir, is that the Board never printed any forms. It mimeographed them and the mimeographed copies were made available to the printers after having been registered at the copyright office.

Q. Mr. Rush, I want you to take Government's Exhibit 26. If you have any doubt that this is an exact copy of the mimeographed form, you will have to read it.

A. I will have to get the mimeographed copy to compare it, Mr. Kramer.

Q. Will you be able to do that during the noon recess?

A. I don't see how I can.

Q. Did the Washington Board have this form of contract copyrighted?

A. Yes, sir.

Q. I hand you Government Exhibit 26 for Identification and ask you if Paragraph 16 in this document was in the same form as Paragraph 16 in the mimeograph form that you handed to the printer?

A. It appears to be verbatim.

177 Mr. Leahy: Was that 25 or 26, Mr. Kramer?

Mr. Kramer: Exhibit 26, Mr. Leahy.

In view of the witness' testimony I suppose, your Honor, it is proper for me to move the admission of Government's Exhibit 26. If there is any doubt about it, I move the admission of only Paragraph 16.

The Court: It may be admitted.

(The document previously marked Government's Exhibit 26 for Identification was received in evidence.)

Mr. Whiteford: I make the same observation as far as the National Association is concerned.

Mr. Leahy: What is the purpose of the offer?

The Court: To show the sales contract was copyrighted by the Real Estate Board with the provision that the seller agrees to pay to the agent the regular rate of commission fixed by the Washington Real Estate Board.

Mr. Kramer: That is precisely right.

Mr. Leahy: What do you expect to prove by that?

Mr. Whiteford: I would like to interpose the suggestion you cannot copyright a legal form anyhow. It may have been printed but my information from the Patent Office is you cannot copyright a legal form.

The Court: We won't go into the question of the copyright. This has been introduced to show the sales
178 contract that the Washington Real Estate Board furnished in mimeographed form. Any form, the testified, could be printed up by any printer.

Mr. Leahy: I object to it as highly immaterial.

Mr. Kramer: If your Honor please, it has been admitted. You mean you move to strike it?

The Court: It is admitted.

Mr. Kramer: I would like to read to the jury Paragraph 16 of the contract. At the top left-hand corner it says "Sales Contract—Copyright by Washington Real Estate Board (Inc.), 1941.

"Paragraph (16). The Seller agrees to pay to , Agent, the regular rate of commission fixed by the Washington Real Estate Board, the amount of which said commission being hereby assigned to the Agent by the Seller out of the proceeds of sale. The party through whom settlement hereunder is made is hereby authorized and directed to make deductions of the aforesaid commission from the proceeds of the sale and to make payment thereof to said Agent."

If your Honor please, could we recess now rather than at 12:30?

The Court: Very well. We will recess until 1:45.

(Thereupon, at 12:25 o'clock p. m., a recess was taken until 1:25 o'clock p. m. of the same day:)

179 AFTERNOON SESSION

(Thereupon, at 1:25 o'clock p. m., the trial was resumed, pursuant to the taking of the recess.)

Thereupon, CHARLES J. RUSH, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (resumed):

By Mr. KRAMER:

Q. Mr. Rush, will you please point out to the jury on that map where Florida Avenue is?

A. Florida Avenue—here is Vermont—it swings along over to Bennings Road and to Maryland Avenue, Northeast.

Q. Now, is the red line that is on the map, is the area included in that red line the area which prior to 1943 carried the rate of 5 per cent on the first $5,000 and 3 per cent on the excess?

A. Yes, sir. In fact, properties bordering that line carried—

Q. (Interposing) The lower rate?

A. —the lower rate, yes.

Q. Mr. Rush, what are the annual dues to be paid by each active member of the Washington Board?

A. The annual dues from members in our Board are $100.

180 Q. Have they been $100 a year since you became the secretary?

A. They were prior to my appointment.

Q. Is any part of that $100 paid over to the National Association?

A. We pay $10 per year to the National Association of Real Estate Boards for each active member in our Board.

Q. Do you know whether or not each active member of your Board has to pay anything in addition in the way of dues than that $10 to the National Association?

A. Not to the National Association of Real Estate Boards.

Q. Did the Washington Board ever receive, while you were secretary, any written communications from any Government agency asking you to change or to increase the rate of commissions adopted by the Washington Board?

A. We never received—I do not recall that we ever received any direct communication from governmental agencies about our commissions.

Mr. KRAMER: If the Court please, this is a document which you do not have a copy of; I am not going to offer it in evidence. I am going to mark it for identification only.

The COURT: Do I have a copy of it?

Mr. KRAMER: No, you don't, sir.

181 (Report of Charles J. Rush, Secretary, marked for identification as Government's Exhibit No. 27.)

By Mr. KRAMER:

Q. Mr. Rush, I hand you Government's Exhibit No. 27 for identification and ask you whether or not you prepared or dictated that document?

A. It appears to be a copy of my report of the Committee.

Q. You believe now, your best recollection is, that you prepared that memorandum of the meeting of that Committee?

A. Yes, sir.

Mr. KRAMER: Your Honor, may we approach the Bench with counsel?

(Thereupon counsel approached the Bench and conferred with the Court, out of the hearing of the jury, as follows:)

Mr. KRAMER: If the Court please, I have reviewed all the documents that we had originally intended to offer, that were written by officers of the Washington Board, that were dated prior to December 8, 1940, and I have found that these two documents are the only two documents that the Government thinks are of real importance to its case.

We therefore would like the opportunity of preparing and submitting to you tomorrow a memorandum explaining why we think that these documents are admissible?

The COURT: What documents are you talking about?

182 Mr. KRAMER: I am referring to Government's Exhibit for Identification No. 15, and Government's Exhibit for Identification No. 27.

The COURT: All that No. 27 is is a memorandum of a meeting of the Committee, and the Committee took no action.

Mr. KRAMER: Would you look at Government's Exhibit 15?

The COURT: That has been excluded, hasn't it?

Mr. KRAMER: That is right, your Honor. You will see on page 2 that the report of the Committee on Rules, saying that no action should be taken until after the National Association's action on rates, was unanimously adopted by the Board.

The COURT: That is this here (indicating), this recommendation here.

Mr. KRAMER: That is right. Now, the Government's case that it has alleged in the indictment is that the action of the Washington Board in 1943 is subsequent to and based on the action of the National Association.

The COURT: The crux of your case is that the National Council and the Washington Real Estate Board entered into a conspiracy. You are attempting to show the conspiracy by putting in a minute of the Board, not doing anything until such time as they had a communication from the National Council: How is that a conspiracy?

Mr. KRAMER: Mr. Leahy, or counsel for the Wash-

183 ington Board made the statement before the Grand Jury—

The COURT: Before the Grand Jury? Before this jury.

Mr. KRAMER: Before this jury, that they didn't care what the National did. He has made that an issue in this case—

The COURT: Oh, no.

Mr. LEAHY: They didn't.

Mr. WHITEFORD: They didn't.

Mr. KRAMER: This shows they did.

Mr. LEAHY: No, it doesn't.

Mr. WHITEFORD: No, it doesn't.

The COURT: No, it doesn't. You want to show that as the result of action taken by the National Council that the Washington Board entered into one agreement with the

Council to do some act which is in violation of the Sherman Law. That is one thing, but merely to put in a memorandum of a committee, which recommendation was to do nothing until they heard from the National Headquarters, which committee's recommendation was approved by the Board, I can't see that it is admissible.

Mr. KRAMER: I grant you that that standing alone would not be admissible against the National, but it seems to me it depends upon what basis the Washington Board acted—

The COURT: I will exclude both exhibits until such time as the Government can sufficiently show me a proper hook-up to show the conspiracy.

184 Mr. KRAMER: Thank you, your Honor.

(Thereupon counsel resumed their places at the counsel table, and the following proceedings were had in open court:)

185 Mr. KRAMER: If the Court please, subject to the right which I request of recalling this witness in the event we are able to make the showing your Honor indicated at the bench, I have no further questions of him at this time.

The COURT: Very well.

Cross Examination.

By Mr. LEAHY:

Q. Mr. Rush, while we are just waiting for the exhibits, if you should be getting tired will you indicate to his Honor that fact because I want you to take it easy now.

A. Thank you.

Q. Nobody is going to try to hurt anyone else. We are just going to try to get the facts and take it easy and act accordingly.

A. Thank you.

The COURT: I may say, gentlemen, I have to sit in conference in the Court of Appeals at 3 o'clock so you may govern your time accordingly. I will have to recess about 10 minutes of 3.

Mr. LEAHY: Thank you, your Honor.

By Mr. LEAHY:

Q. Mr. Rush, I think you told us you were appointed Executive Secretary of the Washington Real Estate Board in 1932?

A. Yes, sir.

186 Q. Is that right?

A. That is right.

Q. And you recall that the Board had been incorporated theretofore in 1928, is that right?

A. That is true, yes, sir.

Q. And I believe a certificate of the incorporation of the Board was offered for your identification, wasn't it or was it?

A. No, sir, it was not.

Q. But you recall that was the date?

A. Yes, sir; 1928.

Q. And just so that the jury may know the kind of a corporation it is, it is a non-profit corporation, isn't it?

A. Yes, sir.

Q. You don't transact any other business save and except the membership business?

A. Membership business.

Q. You have no profit?

A. No profit.

Q. No stock?

A. No, sir.

Q. It is just that each member of the Board is a member of it as he would be of an ordinary unincorporated society?

A. Yes, sir.

Q. And the dues that you pay are $100 a year; is
187 that right?

A. That is right.

Q. And have been all down through the years?

A. Since my appointment.

Q. I am now going to show you what has hitherto been identified as Government's Exhibit No. 3 and I think you will agree with me that that is a photostatic copy of the Constitution, isn't it?

A. Yes, sir.

Q. Is this a better copy?

A. That is an original.

Q. You take a look at this and I will take a look at this photostatic copy. This constitution is the constitution under which you operate as a real estate board, isn't that right?

A. Yes, sir.

Q. And the purpose, after stating the name, is shown in Article 2, is that right?

A. Yes, sir.

Q. And have those objects of that association been the same since you have been the executive secretary?

A. There have been no changes in those since I have been secretary.

Q. In order that the jury may know what we are talking about, these are the objects of the Washington Real
188 Estate Board:

"First—To bring the Real Estate Brokers of Washington, D. C., together;

"Second—To assist in the advancement of the City's interest in general and the real estate business in particular;

"Third—To maintain among the brokers of Washington a high standard of business methods and integrity; to foster a spirit of cooperation and of fair and honorable competition;

"Fourth—to assure to the public services of responsible and trustworthy agents and brokers, acting upon definite and uniform standards of contracts and charges, with the view of protecting interests of all parties;

"Fifth—To affiliate with and take part in all national matters appertaining to real estate through membership with the National Association of Real Estate Boards;

"Sixth—To cooperate with property owners and allied business and professional interests in all matters affecting real estate."

You provide in Article 3 for your membership, don't you?

A. Yes, sir.

Q. Do you have a Membership Committee?

A. Yes, sir; we do have a Membership Committee.

189 Q. All brokers in Washington don't belong to the Washington Real Estate Board, do they?

A. No, sir.

Q. In fact, no man can be admitted to membership in the Board unless he passes an investigation and examination of the Membership Committee?

A. That is true.

Q. And I think you told Mr. Kramer that you had approximately between 250 and 257 members?

A. Some place in there.

Q. And all of those have passed through the investigation and examination of the Membership Committee?

A. Yes, sir.

Q. Is it true that the Membership Committee, in making its investigation of applicants for membership in your Board, seeks to obtain the objective, to-wit: "To assure to the public the services of responsible and trustworthy agents and brokers, acting upon definite and uniform

standards of contracts and charges, with the view of protecting the interests of all parties"?

A. Yes, sir.

Q. Not all applicants are admitted to your Board, are they?

Q. In fact, do you recall how many brokers there
190 are in Washington who are not members of the Board?

A. There are, I believe, some 1,700 or 1,800 brokers licensed this past year and we have 250-odd of those. Taking the junior officers or outside of the principal officers, there may be 450 of the licensed brokers affiliated out of the 1,800-odd.

Q. So that out of the 1,800-odd brokers in the city, you have approximately 250 or 257?

A. Plus the junior officers of the firms.

The COURT: What is a junior officer?

The WITNESS: That will be outside of the principal, the president, the secretary, assistant secretary and so on.

The COURT: You mean of that member that belongs to the Board, don't you?

The WITNESS: Yes, sir, a member of the Board.

By Mr. LEARY:

Q. You have associate members, do you?

A. Associate salesmen.

Q. But as to the brokers, how many broker members have you?

A. We carry our membership on a firm basis. So we will take one of our member officers, like Hagner Company. It has one member in the Real Estate Board but it has possibly six members of the firm who are all entitled to be
191 members of the Board; the president, vice-president, secretary-treasurer, assistant secretary and so on, so that would make approximately 450 licensees who are affiliated with the 250-odd members of the Board.

Q. How many licensees are there in the District of Columbia?

A. More than 1,800.

Q. How many more, do you know?

A. I haven't those figures, sir.

Q. When you refer to licensees you remember, do you not, that the licensee is a broker who has obtained his license from the License Board, is that right?

A. Yes, sir; the District Real Estate Commission.

Q. Does that District Real Estate Commission render an annual report to the public?

A. It does.

Q. I am going to show you the annual report or what purports to be the annual report and see if you can identify it.

Mr. KRAMER: May I see it first, please?

Mr. LEAHY: Yes.

Mr. KRAMER: May I see it?

Mr. LEAHY: Let him see it first. You will see it second.

The WITNESS: It has my name on it.

By Mr. LEAHY:

192 Q. And that is the report, is it, of the Real Estate Commission?

A. Yes, sir.

Q. I want to direct your attention to page 1 of the Real Estate Report for 1938-39 and then I will show you your report for 1946-47, and I will ask you how many real estate men there are in the District of Columbia. Just read it and see if that refreshes your recollection.

How many real estate men are licensed to practice their profession in the District of Columbia?

Mr. KRAMER: I object, if your Honor please.

The COURT: Is there any argument about it? I mean how many licensed real estate men there are?

Mr. KRAMER: I am perfectly willing to stipulate how many there are as of 1947 but I don't want to go back to 1938.

Mr. LEAHY: I don't want any question about it. We will take out 1938. What is the number?

The WITNESS: This is June 30, 1947, which was the last report of the Real Estate Commission.

By Mr. LEAHY:

Q. How many are there?

A. There were 1,881 total broker licenses granted.

Q. How many other licenses were granted?

A. There were 2,480 salesmen's licenses granted, making a total of 4,361.

193 Q. In other words—let's get this straight and you correct me if I make any error on it—does the figure 4,361 indicate that there are that many licensed real estate men, whether you call them brokers or salesmen or whatever you call them?

A. Yes; that indicates those engaged in the real estate business either as principals or salesmen.

Q. And out of that number, you have as brokers and salesmen approximately 400 and something?

A. Approximately, sir.

Q. That is right?

A. Yes; about 450.

Q. To return once more to your Constitution, those members, such as you have just stated, were all admitted to membership in your association after the Membership Committee had investigated their records, their character, their integrity, their industry, their general reputation; is that right?

A. That is right.

Q. Those are admitted to membership only after they have signed the application which was introduced in evidence and identified as Government's Exhibit No. 9. Am I right about that?

A. Yes, sir. That is the application for membership.

Q. That is the application which your require each man who desires membership in your organization to fill

194 out, isn't that right?

A. Yes, sir, that is right.

Q. And on that you seek to get the signed information in answer to the questions you propound in that application, don't you?

A. Yes, sir.

Q. You get his name; his business address; post office zone; residence address; number of District of Columbia or Maryland real estate broker's license; whether or not he is licensed to do business in any other State and give that and state the number of license; state name of his firm or corporation; if he is a member thereof or if a partnership, state the names of all partners, designating the senior partner; or if a corporation or company, describe your connection therewith; give names of all other officers and directors; designate the person to whom all official board mail should be addressed.

Then it continues: "Are you a citizen of the United States?

"How long have you been a licensed broker?

"When was your present business established?

"Class of business in which you specialize.

"What other branches of the business are you or have you engaged in?

"What business or profession did you follow prior to taking up real estate?

"If you are a member of any other real estate board, give name of board and length of time affiliated therewith.

"Financial references, such as banks and trust companies.

"Do you hold membership in any professional or technical groups? If so, give the name.

"Are you a member of any of the institutes or divisions of the National Association of Real Estate Boards? If so, name.

"What has been your occupation in the five years preceding the time of making this application?

"Name at least two active members of the Washington Real Estate Board who are not members of the Membership Committee who have an intimate personal knowledge of you, with whom the Membership Committee may confer freely."

The other paragraph was read to you that you waive all claims against the Board and so forth by reason of anything said or done in connection with this application and on the front they define the name "Realtor". We talked about that in the opening statement.

"A Realtor is a 'person engaged in the real estate business who is a Board member or an individual member of the National Association of Real Estate Boards, is subject to its rules and regulations observes its standards of conduct and is entitled to its benefits. Realtor is so defined in the Association's constitution, Article II, Section 5. The Association diligently promotes its proper use as a safeguard for the public in dealing with real estate agents.

"The term Realtor is not a synonym for 'real estate agent.' It is the distinctive and exclusive designation for those within the membership of the National Association. The term definitely connotes business competence and high standards of business conduct. Every Realtor has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association, and adopted by his own Board to govern real estate practices of members of the Board, and has manifested that he is of good business character and that he is capable of properly caring for real estate members entrusted to him."

I think I have covered that application blank, have I not, fully?

A. Yes, sir.

Q. To return once more, not only on your membership but also you have in your Constitution provided for the various officers, Board of Directors, Executive Committee; then you prescribe the duties of officers and a Nominating Committee; election of officers and directors; Appraisal Committee, together with its duties; an Arbitration Committee; Membership Forfeiture, and then Article 14, "Rules:

"The Board by a majority vote at any regular or
197 special meeting may adopt specific rules of practice or ethics and any such rules when adopted automatically become part of the by-laws and are binding alike on every member, provided, however, that every member shall be mailed a written notice at least ten days before the meeting, which notice shall contain the complete substance of the proposed rule."

And then you have what constitutes a quorum, notices; meetings and then you provide for standing committees.

A. Yes, sir.

198 Those major committees consist of:

Property Management, Brokers, Mortgage and Finance, and Business Property Leasing.

The standing committees consist of from three to five active members and such associate members as it may designate, and it shall also name the chairman.

So with the Membership Committee.

So with the Zoning Committee.

So with the Public Affairs Committee.

So with the Reception Committee.

So with special committees.

The Public Affairs Committee:

"This Committee shall carefully investigate all matters relative to the sale of property to undesirable purchasers as well as other matters of public character that may be referred to by the Board of Directors."

Special committees means that:

"The Board of Directors shall appoint such special committees from time to time as it shall deem wise or necessary in conducting the affairs of the Board."

Then follows something of which mention was made in one of the exhibits, the services of the Washington Real Estate Board available to its members, and those services are contained on the back of the application form, are they not?

199 A. Yes, sir.

Q. And is there any other group in Washington to your knowledge that provides the services there detailed on the back of its application and attached to your constitution?

A. No, sir, I know of no other organization.

Q. You are the only organization that gives those special and particular services, are you not? In the City of Washington, I mean.

A. To its members.

Q. And if any member of the public desires to call you, as the secretary of the Washington Board, would you also give them advice and information with respect to whatever question was put to you by the public?

A. Pertaining to our business, we would.

Q. And is that the reason why your constitution provides for a Public Affairs Committee?

A. Yes, sir.

Q. Here are some of those services, I am going to ask you about them:

Baist's Plat Books of the District of Columbia. Four volumes, all the most recent editions.

For the benefit of the jury will you explain what a plat book is? What is it?

A. It is a large atlas showing a definite portion of the District of Columbia. It comes in four separate
200 volumes, and it shows the lot and square numbers; the size of the lot; the style and type of improvements; sewer and water mains; easements; restriction lines; and such information that is of value to a real estate broker in aiding his client in the sale or purchase of real property.

Q. And that covers the entire District of Columbia?

A. That covers the entire District of Columbia, in four volumes.

Q. In other words, if you go to some one of those four volumes you will know all about a given piece of real estate in the District of Columbia?

A. Yes, sir.

Q. The size of the lot; character of improvements; what facilities are serving the lot?

A. Yes, sir.

Q. And all that?

A. Yes, sir.

Q. Now, you have Plats of Subdivisions Since 1929.

A. In the District of Columbia we have the 800 numbers which are assigned for tax purposes, and there is where a parcel was cut up into a half-dozen lots or dozen lots and

new lines were established, and so on, we have that plat information—not plat book information, because it isn't in books; it is in sheets, and it is very valuable.

Q. And you have preserved those for—

201 A. Twenty years.

Q. What do you mean by "Assessment Book Service"?

A. Each piece of property in the District of Columbia is listed; lot and square number and the area, the assessment for the ground, and the assessment for the improvements; the record owner's names appear therein, and that covers the entire District of Columbia.

That is a special service published by Rufus S. Lusk, which we all subscribe to.

Q. Now, you also have Klinge's Plats of Montgomery County, Maryland. How do you pronounce that?

A. Klinge's, Frank Klinge.

Q. Klinge's Plats of Montgomery County, Maryland, is that similar to the plat book for the District of Columbia?

A. That is similar, but it wouldn't cover the entire Montgomery County area.

Q. How much does it cover?

A. Just about up to Wheaton.

Q. Up to Wheaton?

A. Yes, sir.

Q. And how far west?

A. Cabin John and to Glen Echo.

Q. Have you Franklin Survey Company Plats of Arlington County, Virginia?

A. Yes, sir.

202 Q. And also Franklin Survey Plats of Prince Georges County, Maryland?

A. Yes, sir.

Q. And then you have Zoning Maps of Washington and Metropolitan Area, Posted Following All Hearings in the District of Columbia. What service is that?

A. We have three large, highly colored maps of the District of Columbia, one showing the use area, the height area, and the occupancy.

In most District of Columbia residential properties you can only use 40 feef of ground area, and those maps show that information.

Q. And then you have D. C. Zoning Changes, Notification Prior to and Following All Hearings?

A. The District holds about four zoning hearings a year, and we send detailed information on all proposed changes,

not only on the maps but also in the regulations to our members, so that they may make their recommendations to the Zoning Committee.

Q. And then do you also keep a complete card file showing the record ownership of all lots and parcels within the District of Columbia, posted within 48 hours of recordation of instruments?

A. Yes, sir. We have 185,000-odd cards in there, and most of them show even the stamp consideration under the Federal stamp tax.

203

Q. Apartment House File—Record of Owner, Location, and Agent.

A. We keep that also.

Q. "Right to Use Standard Form and New Copyrighted Apartment Rental Agreement."

A. We have the Standard Forms also.

Q. "Building Permits Covering All Dwellings, Apartments, and Flats—Shown by Street Address and giving pertinent information on builders' costs, etc."?

A. We maintain two separate indexes on that. One we maintain for the entire metropolitan area.

Those files are used by the governmental agencies like FHA, Board of Trade, and various groups, and then we have a separate card under a separate file, which shows the permit valuation of all residential improvements so we can take the cards and tell just exactly what is going on at a certain specified time.

Q. Did you say FHA and governmental agencies have used that?

A. Frequently.

Q. And the Board of Trade?

A. And the Board of Trade, and the Evening Star also, in their Facts and Figures.

Q. "Statistical Data Covering Deeds Recorded, Deeds of Trust and Foreclosure, and Sources of Funds"?

204

A. We have been making that record since 1928, and that data also has been furnished to various public agencies, HOLC, Federal Home Loan Bank, as well as FHA, because it gives them a long-term background.

It was started prior to my time, and we are carrying on and have been since 1928.

Q. In other words, you have co-operated in that respect with all governmental agencies who have been interested?

A. Always do, yes, sir.

Q. And have they been interested in the past?

A. Yes, sir.

Q. And have they used the service?

A. They have up to a few months ago; I had a letter from Mr. Le Gost, of the Home and Housing Finance Agency, or the Federal Housing Agency, thanking us very much for the statistical information he got from us.

Q. Do you keep a "Library of Special Works on All Phases of Real Estate Business"?

A. We are trying to, but they are putting more books out than we can keep up with.

Q. "Services of National Association of Real Estate Boards; Divisional Activities; Special Bulletins; Appraisal and Management Journals"?

A. Yes, sir, we subscribe to those.

205 Q. And are those kept for the general all around information and education of the members of the Board?

A. Yes, sir. We have a lending library as well, and we make it possible for members and their employees to borrow these various publications.

Q. And then you also permit the members to use the word "Realtor"?

A. He is licensed under a certificate from the National Association of Real Estate Boards.

Q. And do you publish weekly a letter on real estate entitled "Headlines"?

A. That is published by the National Association of Real Estate Boards.

Q. What does the weekly letter refer to?

A. Pertinent information on new developments; on legislation; on the activities of the various groups within the National Association of Real Estate Boards, and of recent months carries a very, very splendid letter by President Brady, giving the result of his contacts with other member boards throughout the United States.

Q. "Special Consultation Service to Aid Members in Solving Problems Pertaining to Their Business; Service of Standing and Special Committees; and Co-operative Effort to Stabilize Practices Through Standardization and Study."

A. That is a result of the NRA days when the
206 Government called us in to establish codes for the various phases of the real estate business, and since then whenever members want any special information pertaining to the fact whether they could use a building at Ninth and G Streets and conform to the Building Code, and

so on, members experienced in the Building Code will sit in with them and help them work it out, and such things as that.

Q. Those are the services which you guarantee to a member when he becomes a member of your organization, and if he is accepted?

A. Yes, sir.

Q. I notice it mentioned in the form of the application for members and was read emphatically to the jury therefrom this morning, that every Realtor has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association and adopted by his own Board to govern real estate practices of members of the Board, and has manifested that he is of good business character and that he is capable of properly caring for real estate matters entrusted to him.

Now, your constitution does not provide, or you do not publish with it the Code of Ethics, do you, or does it?

A. Not with the constitution.

Q. I am going to show you now what has been heretofore identified as Government's Exhibit 5, the Code of
207 Ethics. You have seen this and identified it?

A. Yes, sir.

Q. So far as the jury knows up to this time, all they know is with reference to commissions, Section 3, paragraph 1. This is a six-page publication, isn't it?

A. Yes, sir.

Q. And the Section 1 deals with advice and information.

Section 2 deals with listings.

Section 3 deals with commissions.

Section 4 deals with signs.

Section 5 deals with general things, and doesn't it attempt to cover the regulations of the high standard of conduct of the real estate agent in dealing with the public in real estate matters?

A. Yes, sir.

Q. Its purpose, as stated here, is:

"In order to maintain the dignity and professional character of the real estate business, and to promote fair and honorable competition between brokers, the Washington Real Estate Board has adopted this Code of Ethics as the basis of fair and ethical practice. (Adopted September 14, 1922.) (Amended December 12, 1934.)"

Is that the copy of the Board's Ethics which you give each member?

A. Yes, sir.

208 Q. And has there been any amendment to it, particularly outside the question of the commissions, which we are coming to, since 1934?

A. There has been no amendment to the Code of Ethics since that time.

Q. And when you came as the Executive Secretary in 1932, you found this document in about the same shape as you find it now, didn't you?

A. About, and we changed it, as I say, based on NRA days. We made some changes in 1934.

209 Q. In order to conform to what was then the law?

A. To cooperate with the Government in the law.

Q. And that was the reason you made the change in that?

A. Yes, sir.

Q. Let's see what else this provides for:

"A client is entitled to receive and should expect from his broker, competent advice and full information relative to matters entrusted to him.

"Always recommend complete examination of titles in real estate transfers."

That is pretty safe advice, isn't it, Mr. Rush, from your experience?

A. Yes, sir.

Q. And do you recall whether the advice, "A client is entitled to receive and should expect from his broker, competent advice and full information relative to matters entrusted to him," that there was any basis behind that for the adoption of such an ethical standard?

Mr. KRAMER: Objection. He didn't testify he was with the Board when that provision was put in.

The COURT: I will sustain the objection.

By Mr. LEAHY:

Q. I will ask you, Mr. Rush, this: Is it a fact that there are real estate brokers who are licensed here to do business in the District of Columbia, of whom you have heard

210 the complaint that they do not give competent advice and full information?

Mr. KRAMER: Objection as hearsay.

The COURT: Sustained.

By Mr. LEAHY:

Q. (Reading) "Never give offhand valuations. Should an individual appraisal be made, give it the necessary time and study, and charge a fee for the service.

"Always advise exclusive listings.

"At or before the conclusion of negotiations in any real estate transaction the principals interested therein should be fully informed by the broker as to commissions, expenses, charges and adjustments for which they may respectively be liable.

"Exclusive listings should not be accepted unless the broker is qualified and equipped to handle the property and when accepted, the broker is obligated to make special efforts to effect a sale or lease as the case may be.

"Owners when listing properties for sale or lease should be frankly advised by the broker if the asking price is too high or too low.

"All listed properties should be personally inspected before being offered.

"Listings between brokers should be in writing
211 and dated.

"When a broker who had accepted a listing from another broker subsequently receives the same listing direct from the owner without solicitation, he shall not be obligated to further recognize the original broker, but must, however, notify him in writing to that effect.

"Any offer secured by broker 'B' on property previously listed with him by broker 'A' must in every case be submitted through the office of broker 'A' and under no circumstances submitted direct to the owner without first having received permission of broker 'A'.

"Broker 'B' has no right to promiscuously relay to other brokers any listing received from broker 'A'." With regard to Section 3, those are the commissions:

"Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates.

"Commissions should be divided only with established and or licensed real estate brokers.

"Unless agreed in advance brokers when acting themselves as purchaser or tenant should not expect or accept any commission in such transactions and should pay the full board rates of commission when acting as seller, borrower or lessor.

"Commissions should not be accepted from both
212 parties without their knowledge and consent.

"Brokers should not accept commission on cost of repairs or other expenses in connection with properties under their control without the knowledge and consent of the owner.

"Agreement as to division of commissions between brokers acting jointly should be made in writing. Unless special arrangement to the contrary is made prior to the consummation of the transaction the commission should be divided in accordance with the official schedule of commissions adopted by the Board."

Section 4 deals with the signs that go on the property.

Section 5 is in general the regulations which should control the conduct of brokers:

"All reasonable offers made in writing and accompanied by a deposit should be immediately submitted to the owner. Offers received from other brokers should not be held up.

"Brokers should willingly cooperate with an exclusive agent and should never threaten to divert a prospective purchaser because an exclusive agency exists, nor in any other manner attempt to defeat the rights of the exclusive agent.

"No member shall offer real property for sale or for lease on any terms without the full knowledge and
213 consent of the owner or his authorized agent.

"As between two brokers claiming commission on a real estate transaction, in the absence of any special agreement to the contrary, the broker who by fair and open methods actually obtained the contract and deposit shall be the one entitled to the commission.

"No member shall attempt or endeavor to negotiate the sale, exchange or lease of any real property directly with an owner or lessor if he knows that such owner or lessor has a written outstanding contract granting exclusive agency in connection with such property with another member.

"No member shall advertise property for which he is agent (whether by circular, radio, display, so-called 'blind' or 'box number' ads, or by any other means) in such manner as may be misleading or inaccurate in any material particular, or in any way misrepresent any properties, terms, values, policies, services of the business conducted, or create the impression that the advertiser is the bona fide owner.

"No member shall give, or permit to be given, or directly offer to give anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of
214 the employer of such employees, the principal of such agent or the represented party, without the knowledge of such employer, principal or party.

"No member shall guarantee, authorize or permit any person to guarantee future profits which may result from the resale of real property.

"No member shall induce any party to a contract of sale or lease to break such contract for the purpose of substituting in lieu thereof a new contract with another principal."

And thus it goes down to 22.

Is there any other Code of Ethics, other than this which is handed to the successful applicant for admission?

A. No, sir, none.

Q. When your Board acts under your Constitution, in acting for that Board does it have anything to do whatsoever with the National Association?

A. Only after we pay dues to the National.

Q. I mean are you what they call an autonomous board yourself?

A. Yes, sir.

Q. Do you conduct your own affairs?

A. The Board conducts its own affairs.

Q. It doesn't have any connection with the National whatsoever with relation to any matters or things with respect to the conduct of the Board in the District of Columbia?

215 A. We have no contacts along that line.

Q. When you say you are a member, the Board is a member, of the National Association, what does that mean?

A. Well, I stated the other day that I thought we were a little bit hazy. We are affiliated with the National Association of Real Estate Boards. We do not pay any dues as a Board but if we go back to 1913, a certificate of election of the Washington Real Estate Brokers Association with the National Association of Real Estate Exchanges, we have been a part of the National Association since 1913.

Q. Did you ever have any separate certificate for the Washington Real Estate Board as a member of the National Board?

A. No, sir.

Q. Never did?

A. Just that one certificate, which was issued several years ago but dated 1913.

Q. And when you say you are a member of the National Association of Real Estate Boards, what you mean is you are affiliated with it?

A. We are affiliated with it.

Q. The National Board doesn't run your affairs?

A. No, sir.

Q. It doesn't control your business?

A. No, sir.

Q. Has nothing whatsoever to do with the internal
216 conduct of the Washington Real Estate Board at all, does it?

A. No, sir; I should say it doesn't.

Q. You are entirely distinct organizations?

A. We are.

Q. And so far as your own business is concerned you consult the best interests of your own members and care nothing for the National, is that it?

A. It is in the hands of our members or Board of Directors and officers.

Q. And the National has no control over you whatsoever, has it?

A. No, sir.

Q. I think you said also that the affiliation with the National Board does assume that all affiliates will abide by the Code of Ethics which the National Board has laid down?

A. That is what our by-laws say.

Q. I will show you what has heretofore been identified as Government's Exhibit 6. Take a look at it and see if I have the right exhibit.

A. Yes, sir.

Q. That is a copy of the Code of Ethics of the National Association?

A. Yes, sir.

Q. The National Association preamble reads:

"Under all is the land. Upon its wise utilization
217 and widely allocated ownership depend the survival and growth of free institutions and of our civilization. The Realtor is the instrumentality through which the land resource of the nation reaches its highest use and through which land ownership attains its widest distribution. He is a creator of homes; a builder of cities, a developer of industries and productive farms.

"Such functions impose obligations beyond those of ordinary commerce; they impose grave social responsibility and a patriotic duty to which the Realtor should dedicate himself, and for which he should be diligent in preparing himself. The Realtor, therefore, is zealous to maintain and improve the standards of his calling and

shares with his fellow-Realtors a common responsibility for its integrity and honor.

"In the interpretation of his obligations, he can take no safer guide than that which has been handed down through twenty centuries, embodied in the Golden Rule:

"'Whatsoever ye would that men should do unto you, do ye also unto them.'

"Accepting this standard as his own, every Realtor pledges himself to observe its spirit in all his dealings and to conduct his business in accordance with the following Code of Ethics adopted by the National Association of Real Estate Boards:"

218 Then we have Part 1, which is on "Professional Relations."

It deals with everything you can think of in connection with what I stated to you in the opening statement.

"Article 1. In the best interest of society, of his associates, and of his own business, the Realtor should be loyal to the real estate board of his community and active in its work; and he should willingly share with his fellow-members the lessons of his experience.

"Article 2. The Realtor should so conduct his business as to avoid controversies with his fellow-Realtors; but in the event of a controversy between Realtors who are members of the same real estate board, such controversy should be submitted for arbitration in accordance with the regulations of their board and not to a suit at law, and the decision in such arbitration should be accepted as final and binding."

Do you in your constitution provide for such a committee, the Arbitration Committee?

A. Yes, sir.

Q. And do you attempt in the public interest to avoid litigation and law suits by settling differences between your members by arbitration?

A. Yes, sir, we have.

Q. And that is one of your permanent committees, is it?

A. It is one of our permanent committees.

219 Q. And the committee is on the job, isn't it?

A. Yes, sir.

Q. And has been since you have been a member in 1932?

A. Yes, sir.

Q. (Reading) "Article 3. Controversies between Realtors who are not members of the same real estate board should be submitted for arbitration to an arbitration board consisting of one arbitrator chosen by each Realtor from a

real estate board to which he belongs and of one other member, or a sufficient number of members to make an odd number, selected by the arbitrators thus chosen.

"Article 4. When a Realtor is charged with unethical practice, he should voluntarily place all pertinent facts before the proper tribunal of the real estate board of which he is a member, for investigation and judgment.

"Article 5. A Realtor should never publicly criticize a competitor; he should never express an opinion of a competitor's transaction unless requested to do so by one of the principals, and his opinion then should be rendered in accordance with strict professional courtesy and integrity."

Then we go down following through relations to clients. This is the one in which the public is interested:

"Article 12. In justice to those who place their interests in his hands, the Realtor should endeavor always to be informed regarding the law, proposed legislation, and other essential facts and public policies which affect those interests.

"Article 13. In accepting the agency for property, the Realtor pledges himself to be fair to purchaser or tenant, as well as to the owner whom he represents and whose interests he should protect and promote as he would his own.

"Article 14. A Realtor should not buy for himself property listed with him, nor should he acquire any interest therein, without first making his true position clearly known to the listing owner.

"Article 15. When asked for an appraisal of real property or an opinion on a real estate problem, the Realtor should never give an unconsidered answer; his counsel constitutes a professional service which he should render in writing over his signature and only after having ascertained and weighed the facts, for which he should make a fair charge. The Realtor should not undertake to give an appraisal on any property in which he is in any way interested whatsoever, unless such interest is specially disclosed in the appraisal report, and under no circumstances should he undertake to give an appraisal or opinion when his employment is contingent upon the amount of his appraisal or the character of his opinion.

"Article 16. The Realtor should encourage the naming of the actual or an obviously nominal consideration in a deed.

"Article 17. When acting as agent in the management of property, a Realtor should not accept any commission, rebate, or profit on expenditures made for the owner, without his full knowledge and consent.

"Article 18. The exclusive listing of property should be urged and practiced by a Realtor as a means of eliminating misunderstanding and dissentions and assuring better service to the owner.

"Article 19. The acceptance by a Realtor of an exclusive listing imposes the obligation of rendering skilled and conscientious service; when a Realtor is unable to render such services either himself or with the aid of his fellow-Realtors, he should not accept the listing.

"Article 20. Before offering a property listed with him by the owner, it is the Realtor's duty to advise the owner honestly and intelligently regarding its fair market value."

Then comes the relations to customers and the public:

"Article 21. It is the duty of every Realtor to protect the public against fraud, misrepresentation, or unethical practices in connection with real estate transactions.

222 "Article 22. Property should be offered by a Realtor solely on its merit without exaggeration, concealment, or any form of deception or misleading representation.

"Article 23. It is the duty of a Realtor to ascertain all pertinent facts concerning every property for which he accepts the agency, so that in offering the property he may avoid error, exaggeration, and misrepresentation.

"Article 24. A Realtor should never offer a property without the authorization of the owner.

"Article 25. The price at which a Realtor offers a property should not be higher than that which the owner has openly agreed to take.

"Article 26. Before a Realtor buys for a client property in the ownership of which the Realtor has an interest he should disclose his interest to all parties to the transaction.

"Article 27. Before a Realtor sells property in the ownership of which he is interested, he should make it clear to the purchaser that he is acting solely for the owner.

"Article 28. A Realtor when acting as a broker should make it clear for which party he is acting, and he should not receive compensation from more than one party

223 except with the full knowledge and consent of all

"Article 29. Under no circumstances should a Realtor parties to the transaction.

permit any property in his charge to be used for illegal or immoral purposes.

"Article 30. In closing transactions, the Realtor should advise the use of legal counsel when the interest of any party to the transaction appears to require it; and in all

cases he should exercise care in the preparation of documents so that they shall embody the exact agreements reached.

"Article 31. At the time the agreement is reached as to the terms of a transaction the Realtor should fully inform each party regarding commissions and other expenses to which each is respectively liable.

"Article 32. Before the closing of a transaction, the Realtor should recommend the examination of title and conveying papers.

"Article 33. All contracts and agreements to which a Realtor is a party should be made in writing and should be complete and exact.

"Article 34. A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental
224 to property values in that neighborhood.

"Article 35. No instructions nor inducements from any client or customer relieve the Realtor from his responsibility strictly to observe this Code of Ethics."

That is the relation of client, the professional relations. Are there any more here?

A. I think that covers it.

Q. That is all there are, and is that the Code of Ethics to which each member of the National Board subscribes by his membership in his own Local Board?

A. Yes, sir.

Q. Let's come down to our own Code of Ethics. I am going to show you now Exhibit 25. That is December, 1944. You will recall preceding that was one for February 3, 1943; I can identify this by number of the exhibit, but look at that, will you, please, and see if that isn't a copy of one that was identified and offered in evidence earlier?

A. Yes, sir, this is a copy of the 1943. It was never put in evidence.

Mr. KRAMER: Not that I recall, your Honor.

Mr. LEAHY: Oh, I see; I am sorry.

225 The COURT: The schedule of commissions for 1943 has never been introduced.

Mr. KRAMER: We had no copy at the time. If he has one, we would like to have it.

The WITNESS: 1934 is the one we did not have.

Mr. LEAHY: We have plenty of these copies. There is one. Do you want to put that in?

The COURT: I think, Mr. Kramer, what you asked Mr. Rush about was a schedule of commissions; a copy which

he had of 1934 with the amendments pasted in which would bring the schedule to 1943 but you never did put it in.

Mr. KRAMER: That is it exactly. If it were not for the pencil marks, or if counsel has no objection—

The COURT: I take it Mr. Leahy is going to put it in.

Mr. WHITEFORD: Let me give you another copy.

Mr. LEAHY: Yes; let me give you a clean copy. We have plenty of those. You were asking for something else. Here is a clean copy, Mr. Kramer.

Do you want to offer it, Mr. Kramer?

Mr. KRAMER: Without objection, your Honor, I shall offer this as Government's Exhibit 28; copy of the schedule of commissions of the Washington Real Estate Board revised February 16, 1943.

The COURT: Very well.

226 (Schedule of commissions of the Washington Real Estate Board revised February 16, 1943, was marked Government's Exhibit 28 and received in evidence.)

Mr. WHITEFORD: Of course, this is subject to my objection as to all of these items.

The COURT: That is correct.

By Mr. LEAHY:

Q. You have before you, Mr. Rush, the 1943 schedule of commissions?

A. Yes, sir.

Q. We had quite a bit of testimony in regard to meetings of the Board of Directors about these schedules. Do you recall that this morning?

A. There was some discussion, yes, sir.

Q. I am going to show you now Government's Exhibit 20 and ask you if those are the minutes of the meeting of the Board of Directors which related to that schedule?

A. Yes, sir; February 16, 1943.

Q. I want to ask you some questions about this and see if you can clarify it for us, Mr. Rush. It states here, and I am reading from page 2 following the statement, "The secretary then read the amended motion as follows"—when they say "secretary", does that mean you?

A. Yes, sir.

Q. (Reading) "Your committee submits that con-

227 ditions have changed to such an extent since 1917 that the lower commission rate charged on property within the old 'City Proper' area is unfair and inequitable, causes embarrassment and confusion among owners and brokers, and has in many cases caused bad feeling among

owners, who, while not objecting to a 5 percent commission rate, see no reason why they should be charged more than their friend whose property might be a block or less away."

You are referring there to an old 5 and 3 percent commission which had been in force since 1917?

A. That is right.

Q. Can you turn and just look at this map? When you became the secretary of the Board, was this map then in existence and did it control the 5 percent commission in the area which I am now indicating outside the red line and 3 percent inside?

A. Approximately so. There were a few changes we had to make because of the District's change in not cutting through streets which they had contemplated back years before. Montana Avenue, Northeast, I remember was one of them and T Street, Northwest, in the Georgetown area.

Q. But is it generally accurate to state that this area controlled the 3 percent rate?

A. Yes.

Q. And this area (indicating) controlled the 5 per-
228 cent rate?

A. Yes, sir.

Q. I guess you had better tell us what this line on the West is because I can't get it.

A. I will have to read each line of the streets off there.

Q. For instance, this comes down Blagden Avenue and circles around west of the zoo?

A. Rock Creek Park.

Q. If you could locate it by just telling us so we can understand where we are.

A. It think it is Klingle Road; 32nd Street down Cathedral to 29th Street; 29th to Calvert to Connecticut Avenue and a point half way across the bridge, down to the middle of Rock Creek Park; across Massachusetts Avenue, up T Street to 35th Street; to Reservoir Road to a line approximately south of Georgetown University at 40th Street and then to the middle of the Potomac River.

Q. And up the Anacostia River. On its north boundary, it took in Mt. Olivet Road; Franklin Street; Harewood Road; then skirted on the line of the Soldiers Home. Then it came over Decatur Street to Georgia Avenue; down Georgia—

A. (Interposing) To Buchanan, back up again to Iowa, to Decatur and over Decatur to Blagden Avenue.

Q. Does that mean that the properties within
229 that area were carrying a 3 percent commission?
A. 5 pecent of $5,000 and 3 percent on the balance.
Q. 5 and 3 in this area (indicating)?
A. Yes, sir.
Q. And 5 percent in the area outside?
A. Outside; beyond the properties—
Q. (Interposing) Which we have indicated?
A. Yes, sir.

The Court: Gentlemen, I will have to recess now in order to go to a conference in the Court of Appeals.

(Thereupon, at 2:55 o'clock p. m., a recess was taken until 10 o'clock a. m. the following day, Wednesday, May 26, 1948.)

230 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950–47

UNITED STATES OF AMERICA,
PLAINTIFF,
VS.
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and WASHINGTON REAL ESTATE BOARD,
DEFENDANTS.

Washington, D. C.,
Wednesday, May 26, 1948

The above-entitled action came on for further trial before the Honorable EDWARD M. CURRAN, Associate Justice and a Jury, at 10 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor H. Kramer, Trial Attorney.
Joseph P. Kelly, Jr.,
Herbert N. Maletz,
C. Heyward Belser,
Attorneys, Department of Justice.

231 On behalf of the National Association of Real Estate Boards:
Roger J. Whiteford,
John J. Wilson,
Jo V. Morgan, Jr.

On behalf of the Washington Real Estate Board:
William E. Leahy,
William J. Hughes, Jr.

233 PROCEEDINGS

Mr. KRAMER: If the Court please, at page 165 yesterday I made the statement that I had never talked to Mr. Rush at all except in the presence of his counsel. I meant to say, of course, since this case was brought.

Thereupon—

CHARLES J. RUSH resumed the witness stand and was examined and testified further as follows:

Cross Examination (Resumed).

By Mr. LEAHY:

Q. Mr. Rush, I think yesterday afternoon, just before Court adjourned, we were on this map and trying to trace for the jury the outline so that they would get some fair understanding of just what area was included in what we call the Old City Area, and then the outlying area. Do you recall that?

A. Yes, sir.

Q. Can you see that all right?

A. I can't read the names at that distance.

Q. As I understand it, about the northernmost point would be over in the east, the northeast, somewhere over here, by what?

A. Kingman Lake, Anacostia River and then Benning Road.

Q. Can you locate that with the Electric Light
234 Plant over there?

A. This is it here (indicating), the power plant, and this is Langston Terrace up here, I believe.

Q. So it is about in the area where the electric power plant is now?

A. Yes, sir.

Q. And the northwest edge of it would go around Soldiers Home and come down Blagden Avenue and Decatur?

A. That is right.

Q. All right. You may resume the stand. Isn't it true, Mr. Rush, that in that area which is within those red lines we have what we might call the old city and its environs just north of Florida Avenue?

A. Yes, sir, I would call that the older portion of the city.

235 Q. Gradually, is it not true that real estate developments began out beyond the boundaries of the red lines which we see there?

A. That is correct.

Q. And 1943, which was the date to which your attention was attracted, isn't it true that in those outlying areas which we see that most of the building in Washington had occurred?

A. In the outlying areas, yes, sir.

Q. And we had all of the northwest area and all of this area over on MacArthur Boulevard, in through there, west of Georgetown University and we had out here in the northeast and over in the Anascostia area and in the southeast a tremendous development?

A. Yes, sir.

Q. And isn't it true that in some sections of the northwest area, for instance Wesley Heights and the Valley beyond, we had that improved since these lines had been established or drawn?

A. That is true.

Q. And isn't it also true that a great section here in the northwest was built up with apartment houses?

A. Yes, sir, quite a few.

Q. For instance, over in the northwest area, the more expensive homes?

236 A. That is true.

Q. Within that red line, did that include the Massachusetts Park development?

A. It was so close to the boundary line that there were a great many discussions as to whether it was 5 and 3 or a straight 5.

Q. I was about to ask you that. As a result of this artificial boundary which was established along through here, isn't it true that there was a great deal of confusion as to what the commission really was, whether it was 5 and 3 or the straight 5?

A. We had many inquiries. In fact, they developed into complaints because of the lack of knowledge of the dividing line.

Q. Was that lack of knowledge among the brokers only or was it among the public?

A. The public as well as the brokers and the title companies themselves.

Q. So is it safe to tell the jury that, as a result of it, there was a great deal of confusion on the overall rate?

A. Yes, sir.

Q. Up until 1943, in February; was that not the date?

A. Yes, sir, February 16.

Q. The prevailing rate was 5 on the first $5,000 and 3 on everything over $5,000 on sales?

237 A. That is right.

Q. Now in the outlaying areas it was a straight 5 percent?

A. Correct.

Q. And a straight 5 percent governed notwithstanding the value of the property?

A. There was no ceiling.

Q. If it was an apartment house, $100,000, $200,000 or even $1,000,000, it was still a straight 5?

A. Yes, sir.

Q. Isn't it true also that within this red line by the year 1943, practically the entire area had been built up?

A. That is, we would say, true. There was very little activity in the central city area.

Q. If there was any activity at all in the real estate business, it would be on the sale of business properties, one; or, two, on the sale of older properties to be remodeled within the central city area?

A. That would be the general picture.

Q. Can you tell us about how long it was that this old area had been established here in the District?

A. I have always dated it back to approximately 1917: the horse and buggy days.

Q. In those days, there were not so many automobiles as we all know, isn't that true?

238 A. That is true.

Q. Do you recall why it was that the straight 5 percent overall was in the outlying area the prevailing commission and 5 and 3 in the downtown area?

A. There was more time involved; greater effort in the outlying areas to take prospects out.

They tell me, in various discussions with oldtimers, about how they drove out in the horse and buggy, some of them, and how they hired public conveyances—

Mr. KRAMER (interposing): Objection, your Honor.

The COURT: Sustained.

By Mr. LEAHY:

Q. All right. I guess the jury would know that anyway. In 1943, I think there was introduced in evidence an exhibit which constituted the minutes of a meeting of your Board, and a second exhibit, a notice which you sent out to the membership of your organization. Do you recall those

two exhibits? Do you have them there handy? One is a meeting of the board in January, 1943, wasn't it, or can you remember?

A. It was either January or February, sir. I don't remember the exact date as to that.

Q. Take a look at this and see if you identify what has hitherto been offered in evidence and marked No. 18. Is that the correct one or is it 20, a photostat of which I now show you?

239 A. This is a meeting in advance of the date on which the change was made. No. 20 is the minutes of the meeting held Tuesday, February 16, 1943.

Q. And is this the meeting at which—

A. The change was made, yes, sir.

Q. All right. This other that I hold in my hand was merely a notice of the meeting which you sent out, wasn't it, Exhibit 19?

A. This was the notice of the meeting sent out in accordance with our rules.

Q. Let's go back first to Exhibit No. 18. I would like to ask you this before I bring your attention to Exhibit 18—was the confusion which you have just told the jury about with reference to this rate increasing or decreasing at the time your Board met in 1943?

A. Well, I believe so. It had increased to such an extent that we had had to reproduce our maps which we had originally published in 1934.

Q. You had to reproduce them for what purpose?

A. For distribution to the brokers and the salesmen. There were more salesmen in the real estate business, more brokers, and we furnished all of them with copies of these maps upon inquiry, upon request.

240 Q. And what were the miniatures of the larger map which you now have before you on that easel?

A. It was a reproduction of the central city area just showing the boundary lines. We did not reproduce the entire map.

Q. I am going to show you now what purports to be a reproduction of those maps and ask you if that is what you are referring to?

A. Yes, this is the reproduction I am referring to.

Mr. Leahy: May that be marked?

The Court: It is in evidence.

Mr. Leahy: Oh, is it in evidence?

The COURT: Yes.

Mr. LEAHY: Surely, Exhibit No. 13.

By Mr. LEAHY:

Q. So this is the smaller reproduction of this map here, which you had to reproduce for your membership, in order to prevent the confusion which you have just mentioned?

A. Yes, sir.

Q. And notwithstanding your distribution of that to the membership was there still confusion?

A. Yes, sir; naturally.

Q. And your Board then took up the matter first on January 20, 1943, and these are the minutes of that meeting, is that right?

241 A. Yes, sir; they are the ones that do not have my signature, but they are the minutes.

Q. And your Brokers' Committee is referred to in that. That is, again, one of the standing committees to which we drew the attention of the jury yesterday, in your constitution?

A. Yes, sir.

Q. And the Brokers' Committee evidently had made a recommendation:

"The recommendation of the Brokers' Committee relative to elimination of the Commission Boundary Zone as follows was read by the Secretary."

They had, is that true, made a recommendation, or have you any independent recollection on it?

A. Yes, sir, they did make a recommendation.

Q. By the way, the Board didn't meet just to consider that question, did it?

A. No, sir, it was just part of the regular monthly activities of the Board.

Mr. LEAHY: The activities of the Board, as shown by these minutes, gentlemen, shows a report of the Executive Committee; some membership changes; voting to place on the inactive list a couple of names; associate members elected; active members—the Secretary is authorized to drop one; drop another.

242 Here is another. "George T. Walker expects to receive a commission in the United States Marines in the near future and he is turning over his business to Walker & Dunlop, and the Secretary was authorized upon receipt of formal notice to place Mr. Walker's name on the inactive list.

"With reference to the request from the National Association of Real Estate Boards concerning the individual membership of Hardy W. Jacobs, Mr. Koones was named to make a special investigation and to submit a report concerning this application."

Is that along the line of what you testified to yesterday, that when an application for membership came in there was an investigation made of the applicant?

A. Yes, sir.

Q. Then they took up the question of legislation, amending the District of Columbia Unemployment Compensation Law to provide for the experience rating plan.

Mr. KRAMER: Keep on.

Mr. LEAHY: You bet. This is an interesting thing that Mr. Kramer just wants emphasized:

"Report made that the Executive Committee held on the charges filed by Sandoz, Inc., against W. C. and A. N. Miller Development Company and that they recommended that the Miller Company agree to an arbitration hearing.

It was also brought out that the hearing was held
243 Tuesday, January 19, 1943, the Miller Company having agreed to the arbitration."

By Mr. LEAHY:

Q. Is that along the line of what you told the jury yesterday, that when members had complaints against each other they brought it before your Board, and that you had established an arbitration committee to iron those things out?

A. Yes, sir.

Q. Rather than take up the time of the courts in litigation, and so forth? A. Yes, sir.

Q. And W. C. and A. N. Miller are a pretty big company, aren't they? A. Yes, sir.

Q. And Sandoz is a pretty big company, isn't it?

A. Yes, sir.

Q. So it makes no difference as to who or what may be the party against whom the complaint is preferred, or what, the Board takes it up?

A. When the members agree to arbitration.

Q. And that's why you have the arbitration committee as a standing committee?

A. Yes, sir.

Mr. LEAHY: (Reading): "The question of procedure in questions involving misunderstandings with members and their declination to agree to arbitration was discussed.

244 and the Chair was duly given authority to appoint a Committee of Three to review the Board's arbitration procedure and ascertain if any changes should be made."

By Mr. LEAHY:

Q. The recommendation of the Brokers' Committee, which I have just brought to your attention, the fact that the Brokers' Committee had made a recommendation about this suburban and city area commission arrangement, that was discussed?

A. Yes, sir.

Mr. LEAHY: (Reading): "Modifications of the Exchange Commission Schedule were then considered, and the following changes were duly approved."

Now, we will hold that for the time being, because we will come to the exchanges in just a moment. I will want to get these matters concerning this committee.

By Mr. LEAHY:

245 Q. Now, I am going to show you again Exhibit 20. That has your name on it?

A. Yes, sir.

Q. Who is that person there?

A. Claude Livingston. Mr. Livingston is deceased.

Q. And this is the meeting in which this whole matter was taken up?

A. February 16, this is the minutes of a special meeting of the Board at which that question was considered.

Q. How many members are there on your Board?

A. There are 15 members of the Board of Directors, which cover the officers and directors.

Q. It would appear to me from the names that are marked present there, that there were more than fifteen that day.

A. This is a meeting of the Board itself, the entire membership.

Mr. LEAHY: Oh, I see. I think I will read this to you, ladies and gentlemen, so you will have the whole picture so there won't be anything left out.

There is quite a list of the members there, I believe there are about fifty, somewhere between forty and fifty; maybe you would like to know the names:

President Livingston. He is dead and gone now.

The WITNESS: Yes, sir.

Mr. LEAHY: Is Mr. Phillips still alive?

246 The WITNESS: Yes, sir.
Mr. KRAMER: Which Mr. Phillips?
Mr. LEAHY: It is marked First Vice President Phillips.
The WITNESS: That is Homer Phillips.
Mr. LEAHY (reading):
William L. Beale
Edward R. Carr
Frank S. Phillips
L. T. Gravatte
Joseph A. Herbert, Jr.
Frank M. Doyle
O. M. Walker
J. Lee Donnelly
J. B. Bowling
Charles C. Koones
F. Eliot Middleton
Edward H. Brent
F. A. Murray
George R. Linkins
William A. Hill
John H. Davidson
A. C. Houghton
G. H. McCeney
George Y. Worthington, III.
Thomas L. Phillips
247 Owen Hohenstein
E. H. Croxton
R. V. Narceron
F. W. Stoever
G. Calvert Bowie
Thomas D. Lewis
Gilliat & Company
Mrs. Chase (Laura Holland Company)
Frances Powell Hill
J. Wesley Buchanan
J. Garrett Beitzell
A. J. Moore
Thomas W. Sandoz
C. H. Hillegeist
C. Allen Sherwin
Jack Hayes
L. F. Colbert
H. Glenn Phelps, and others.

"The Chair called the meeting to order at 2:15 p.m. stating that the Board of Directors had adopted the re-

port of the Brokers' Committee recommending that the present commission boundary zone be eliminated, and that in compliance with their action a meeting had been called in order that the members could consider the proposed changes."

248 By the way, under your constitution was this a matter that had to be passed upon by the membership as a whole?

A. By the membership; no dissent in the entire membership.

Mr. LEAHY (reading):

"Mr. Sandoz, Chairman of the Brokers' Committee, was called upon to read the Committee's report, which provided for the elimination of the commission boundary zone; the adjustment of the commission rate to provide for a commission of 5 per cent up to the $50,000 and 3 per cent on the excess above $50,000 on all sales in the District of Columbia and adjacent metropolitan area, a minimum sales commission of $100; and an adjustment in the exchange commission rates to conform.

"After reading the report, Mr. Sandoz duly moved its adoption, which was seconded by Mr. McCeney. The subject was generally discussed, it being agreed that the boundary zones should be eliminated as being inequitable and unfair to owners of property located adjacent to the boundary lines which placed them in the higher rate area, as well as the cause of much confusion on the part of property owners and brokers.

"Mr. Bowie offered an amendment to set the ceiling on the 5 per cent rate at $25,000, which was seconded by Mr. Bowling, but failed of passage.

249 "The question of the effect of the amendments upon brokers operating in Maryland was discussed, and the Secretary stated that under authority granted the WREB by the Directors of the National Association of Real Estate Boards, the Local Board had jurisdiction over those portions of Montgomery and Prince Georges Counties which were included in Washington's metropolitan area and established by the Census Bureau."

By Mr. LEAHY:

Q. Now, Mr. Rush, in order to clear that up for the jury, when you become affiliated with the National Association of Real Estate Boards does the Local Board in its application for affiliation disclose what jurisdiction it is claiming or it is asking for itself?

A. I can not answer with knowledge.

Mr. LEAHY: All right. (Reading) "Motion offered by Mr. Thomas L. Phillips, seconded by Mr. Colbert, clarified the situation with reference to Maryland and continued the existing rate for that area upon acceptance of the amendment."

By Mr. LEAHY:

Q. Could I clear it up by asking you this question, Mr. Rush? As a matter of fact, does the Washington Real Estate Board include the entire metropolitan area?

A. Not the entire metropolitan area.

Q. How far does it reach?

250 A. May I explain that, just to clear it?

Q. Yes.

A. The Washington Board had jurisdiction originally over the District of Columbia. There was an Arlington, Alexandria, and Fairfax Real Estate Board organized in Virginia. Many of our members operated in these various areas.

Later, after 1932, the National Board created an individual form of membership so that a Realtor desiring to become affiliated with the National Association could do so in an area.

There was no Local Real Estate Board under the individual form of membership.

That left Montgomery and Prince Georges Counties, which is part of the District of Columbia trading area, wide open for individual membership, and we felt that we should have jurisdiction over that so that there would be in time real estate boards organized in that area.

So in 1934 the National Board of Directors gave the Washington Real Estate Board jurisdiction over Montgomery and Prince Georges Counties, which we have since served because of the establishment of real estate boards in Montgomery County and in Prince Georges County, Maryland.

251 Q. So you gave up that when the counties grew to the point where each established its own board?

A. Yes, sir

Q. So that as of 1947, what was your jurisdiction?

A. 1947, we no longer had jurisdiction over Montgomery County, but we still had over Prince Georges County. We have just recently given that up; in fact, last month.

Q. Then comes this (reading):

"The secretary then read the amended motion as follows:

"'Your committee submits that conditions have changed to such an extent since 1917 that the lower commission rate charged on property within the old "City Proper" area is unfair and inequitable, causes embarrassment and confusion among owners and brokers, and has in many cases caused bad feeling among owners, who, while not objecting to a 5 percent commission rate, see no reason why they should be charged more than their friends whose property might be a block or less away.

"'We further submit that the broker's main stock in trade is his time, and that the sale of a "downstown" property, except for possibly a few minutes in "showing time", consumes the same amount of time and effort in completing the transaction to settlement as does the sale of a property in the outlying sections.

252 "'Your committee mentions that which is common knowledge, namely the greatly increased costs of doing business, which costs have steadily increased over the years and give every indication of continuing to do so in the years to come.

"'The real estate brokerage office operating on a fixed commission basis, is in the unenviable and unfair position of being forced to absorb itself all of the increased costs, and, while at present, there has been a good volume of business, we submit this condition is temporary, unusual, and cannot be relied upon to continue. Also, clients of brokerage offices are receiving, without charge, services which the public has never received before; namely, advice, guidance, and in many cases physical effort, in compliance with the Rent Control Act and Fuel Oil Rationing Act.

"'Lastly, we submit there is no legitimate reason why the commission rate in Washington, D. C., which has been well described as the Capital of the World, should not be comparable to those rates charged by other large cities, the rates of which are shown below:

Philadelphia, 5 percent straight—no ceiling.

St. Paul, 5 percent straight—no ceiling.'"

In other words, those rates were the same as the rates originally in the outlying areas?

253 A. Yes, sir.

Q. Straight 5 percent and in St. Paul and Philadelphia they are that now?

A. Yes, sir.

Q. (Reading:)

" 'Syracuse, New York, 5 percent straight—8 percent beyond 7 miles from center of city.

" 'Chicago, 5 percent to $100,000—3 percent above.

" 'Kansas City, 5 percent to $100,000—3 percent above.

" 'Columbus, Ohio, 5 percent to $100,000—4 percent above.

" 'It will be noted that the suggested change eliminates the theoretical boundary line but at the same time fixes the District of Columbia rate a great deal more favorable to the property owner than in any city above named.'

"The subject was generally discussed as well as the proposed $50,000 ceiling. An amendment was offered by Mr. Breuninger to the motion of Mr. McConihe for the adoption of the report providing for a $25,000 ceiling but this was rejected by a majority vote.

"The motion providing for a 4 percent overall rate died for want of a second. During the discussion, it
254 was suggested that the Board make a study of services performed by members for which they are not now being compensated. The motion offered by Mr. McConihe and seconded by Mr. Hohenstein providing for adoption of the report of the Brokers Committee was then unanimously approved.

"Secretary stated that the Board's rules 'Article 14' and 'Article 17' provide that a written notice be mailed to every active member at least ten days prior to the meeting, said notice to contain the substance of the proposed amendment, and that said notice would be sent without delay.

"Secretary reported that Frank J. Luchs was being commissioned an ensign in the United States Navy and therefore would have to relinquish the chairmanship of the Business Property Leasing Committee. Raymond M. Taylor of Shannon & Luchs was named to succeed Mr. Luchs and it was suggested that Carey Winston be named to succeed Mr. Strong on the same committee.

"Lansing Valk and Frank S. Phillips were added to the members of the Brokers Committee upon the recommendation of Chairman Sandoz.

"The secretary reported on the status of rent control legislation pending before Congress and also on the co-
operation of members with the War Housing Center
255 in obtaining accommodations for members of Congress.

"There being no further business, the meeting adjourned."

What does that refer to, that "the secretary reported on the status of rental control legislation pending before Congress and also on the cooperation of members with the War Housing Center in obtaining accommodations for members on Congress"?

A. Those were two very vital activities during the war. One, of course, was the cooperation with three other local groups in the real estate and financial field in the preparation of rent control legislation for the District of Columbia which would be fair and equitable to tenant as well as landlord based upon the experiences with the Ball Rent Act and the Salisbury Rent Resolution following World War I.

Q. Did your Board cooperate with Congress in that?

A. We cooperated to the extent that we had Barrett Prettyman as our counsel in consultation and in the preparation of the proposed legislation. In regard to houses for members of Congress, I spent five years on Capitol Hill so I know something of the problems.

Mr. KRAMER: I object. How much longer are we going into this?

Mr. LEAHY: You offered the exhibit.

Mr. KRAMER: Yes. Go ahead if you think it is relevant.

256 Mr. LEAHY: I think it is relevant because it shows the activities of the Board are not restricted to mere consideration of commissions. All the jury heard was raising the commissions. The jury might have thought that that was all the Board met for.

The WITNESS: Anyway, we set up a special committee to cooperate with the Board of Trade and Defense Housing Corporation for housing not only members of Congress and their staffs but incoming workers and later war workers and financed a great deal of that through our own organization.

By Mr. LEAHY:

Q. I want you to verify something I said. Did your Board cooperate in trying to establish a rent commission act for the District of Columbia and setting up the real estate commission?

Mr. KRAMER: Objection, your Honor.

The COURT: Sustained.

Mr. Rush, let me ask you a question.

The WITNESS: Yes, your Honor.

The COURT: Is there anything to stop a real estate broker who is a member of the Washington Board from charging 7 percent as his commission?

The WITNESS: No, sir. That is a private agreement.

The COURT: He can charge any percent he wants?

The WITNESS: In a private agreement, we have no
257 jurisdiction at all. There are no rules or anything.

The COURT: Suppose a person wants to sell a piece of property and he is asking $50,000 for it. The commission up to $50,000 would be 5 percent. That would be right, wouldn't it?

The WITNESS: That is right, yes, sir.

The COURT: So the broker goes to the party and says, "I have got a purchaser for your property and I am authorized to offer you $45,000 for it."

The owner says, "No. I won't take $45,000 but I will tell you what I will do. I will let that property go for $47,500 and take that loss if you will make your commission 4 percent."

Did that ever happen?

The WITNESS: I am afraid that has happened too many times. It happens all the time.

The COURT: What happens as a result of that?

The WITNESS: Nothing, sir.

The COURT: So that even though the Board has in its Code of Ethics these schedules, there is nothing to prevent a real estate broker who is a member of the Washington Board from going out and, as a matter of fact, charging any commission he sees fit, is that right?

The WITNESS: That is right, sir.

By Mr. LEAHY:

258 Q. Have you ever disciplined a member of your Board for doing that thing that you have just told the Court?

A. No, sir; not since I have been secretary and I know of nothing in any of the records.

Q. Have you ever suspended anybody?

A. No, sir.

Q. Have you ever expelled anybody?

A. No, sir.

Q. Have you ever dragged him on the carpet and criticized him or anything like that?

A. No, sir.

Q. So that, notwithstanding all this we have heard with reference to the fixing of fees, isn't it true that the individual broker in an individual transaction can charge any commission to which the seller or the purchaser agrees?

A. It is always a question of agreement, yes, sir.

Q. And of an individual agreement in each individual case?

A. Every case is an individual one.

Q. And you exercise no control over what the individual broker does with his individual commission?

A. No, sir.

Q. And you know that to be a fact, don't you?

A. Mr. Leahy, I have been doing this work for 25 years, sir. I do know that is the truth.

259 Q. Mr. Rush, in these meetings—I am going to cut this short in view of that testimony—in these meetings you are talking about of the Board and of the general membership, you were present, weren't you?

A. In these meetings we are talking about?

Q. Yes.

A. Yes. Only since my illness have I been putting the work on somebody else.

Q. Did you personally ever conspire with the National Real Estate Board to try to restrain the trade of real estate here in the District of Columbia?

A. No, sir.

Q. Did you ever hear any member of the local board itself, in a local board general meeting or in a board of directors meeting ever utter anything about conspiring with the National Real Estate Board about controlling the trade and restraining the trade of real estate here in the District of Columbia?

A. No, sir; that has never come up. In fact, it is not even in our minds in any way.

Q. Whatever you did, you did for the best interests of Washington and your own Real Estate Board?

A. And for the Washington Real Estate Board and the public in the District of Columbia. The National Association has no jurisdiction over our activities on that line.

260 Mr. Leahy: I think that is all.

The Court: Mr. Rush, is the only communication received by the Washington Real Estate Board from the National Association of Real Estate Boards in reference to a guide on rates, rules and customs and particularly directing your attention to rates, was that the only information received by you that it ought to be 5 percent on the first $100,000?

The Witness: Your Honor, I received that guide.

The Court: This is prior now to the time you had your meeting at which you approved the report of the committee

adopting 5 percent on the first $50,000. In this communication that you received from the National Association of Real Estate Boards, my recollection was that they had suggested 5 percent on the first $100,000 and I am trying to find out if that was the only suggestion or report that you received in reference to that matter from the National Association?

The WITNESS: I received two copies, according to Mr. Barnard's letter. What I did with them, sir, I can't recall because, after all, we already had our 5 percent overall for the District of Columbia and what the National guide said—

The COURT: What I am trying to find out is—

Mr. WHITEFORD (interposing): That is on page 9, your Honor.

The COURT: Page 9?

Mr. WHITEFORD: Yes, at the top of the page.

261 The COURT: It says here, "All commissions shall be based on total values or sales prices of property and not on equities or partial payments. Commissions on the sale of improved or vacant property shall be not less than 5 percent on the first $100,000."

Yours was 5 percent on the first $50,000?

The WITNESS: Yes, sir.

The COURT: So that the local Washington Board did not accept the suggestion made by the National Association of placing 5 percent on the first $100,000?

The WITNESS: I doubt that they even considered it, sir. I don't recall that they considered it in any respect.

Mr. LEAHY: That is all, your Honor.

Mr. WHITEFORD: At the risk of some repetition, perhaps we can determine without questioning Mr. Rush by comparing this guide and the figures of February, 1943, that it isn't only that difference but there are dozens of differences in those two schedules.

Cross Examination.

By Mr. WHITEFORD:

Q. Mr. Rush, you said that you doubted that your Board had even considered this so-called guide. Were you present at the meetings, all the meetings that discussed this change and discussed it with the brokers?

A. Most of the meetings I attended but I can't say

262 that I attended all of the committee study meetings. We only had two copies of that.

Q. Yes. Did you yourself, as far as you can remember, make any use of this or pay any attention to it at all?

A. Just kept it in my desk as a file with other material which came in from the National Association. I have about four storage files of stuff from the National Association.

Q. You were asked, in a letter that was offered in evidence yesterday, to look it over and see what you thought of it. Did you ever answer the letter?

A. Not to my knowledge.

Q. You never even gave the National Board the benefit of your views about it?

A. It was none of their business on that score.

Mr. WHITEFORD: That is all.

The COURT: You or the Board, however, waited, as a matter of fact, before adopting the 5 percent on the first $50,000 until such time as you heard from the National Association in reference to this matter. That is a fact, isn't it?

The WITNESS: No, we never considered this. At one of the meetings that was held it was stated that this matter should be held up but, you see, your Honor, each year half of my board of directors change and all of the officers
263 and all new committees. Unless I dig out the committee action of last year and put it over into the jacket for the pending year or the coming year's business, why we don't refer back to those things and I have no knowledge of us having referred back to this report.

The COURT: I will ask you this, Mr. Rush: If the Board Commission Study Committee, which committee had recommended that no action be taken in connection with the commission schedules until such time as the Washington Real Estate Board was in receipt of a recommendation of the Committee on Rules, Rates and Customs after they were approved by the National Association of Real Estate Boards—

The WITNESS (interposing): That meeting was when, your Honor?

The COURT: February 17, 1939. What I am trying to find out is this: You say that it was none of their business. My question is regardless of what action the Washington Real Estate Board took, it was taken after an opportunity was afforded the National Association to submit to the Washington Real Estate Board its views as to the schedules, isn't that correct?

The WITNESS: That is correct.

The COURT: Then you took what action you wanted to take?

The WITNESS: But the thing is that this case in
264 1943 came about purely through our local committee.

Nothing was done any further on that because, having been tabled at that time—

The COURT: You received the view from the National Association in a letter and enclosure dated June 16, 1944, and you made your changes on February 16, 1943.

The WITNESS: Yes, sir.

The COURT: Are there any more questions, Mr. Kramer, you desire to ask?

Mr. KRAMER: Yes; I would like to ask some further questions, your Honor.

Re-direct Examination.

By Mr. KRAMER:

Q. Mr. Rush, did the members of the Washington Board agree that a standard rate of commission on sales of real property in the District of Columbia should be 5 percent on the first $50,000 and 3 percent on the balance at the meeting of February 16, 1943, about which your counsel asked you?

A. Yes, the members voted.

Q. You testified, did you not, that the rates of commission are frequently ignored by members?

A. Yes, sir.

Q. I don't want to put words in your mouth.

A. Yes; but I am helpful.

Q. How many instances can you remember from
265 your own knowledge where the rate of commission was less than that fixed by the Board or agreed to by the Board?

A. I can't sit down and just call off here, but we have had letters from our members outlining a number of instances where they have accepted less than the standard rate of commission for their services, innumerable instances. I believe our counsel has communications from our members on that subject.

Q. Are those letters written after or before August 27, 1947?

A. After August 27, 1947.

Q. After?

A. After.

The COURT: How about before?

Mr. LEARY: No. I think the letters were written, if your Honor please, afterward because there was no occasion to write the letters before.

Call in Mr. Taylor, Mr. Kramer. He has a package that high.

The COURT: I don't mean the letters. I mean the actual transactions.

Mr. LEAHY: Extending back through the years. Every single witness who will take the witness stand will tell the same story.

Mr. KRAMER: I think that remark should be stricken.

266 Mr. LEAHY: I didn't say that facetiously.

Mr. KRAMER: Let's not testify.

The COURT: Just a minute. I will strike the statement. Proceed.

By Mr. KRAMER:

Q. As a matter of fact, Mr. Rush, haven't you, prior to August 27, 1947, received many letters from members of the Washington Board asking you what the standard rate of commission was in given circumstances?

A. We have received inquiries, yes, sir.

Q. And you have answered all of them, either orally or in writing?

A. Yes, sir.

Q. As a matter of fact, haven't you received communications from the members of your Board asking you whether they could cut the standard rate of commission without violating their agreement with the Board?

A. Yes, sir; and I have explained why we didn't believe that it was good policy to go out and solicit or accept business; that it was a question of contract, as I explained yesterday, and different types of construction, different activities.

Q. As a matter of fact, you told them it was unethical and improper to cut rates, did you not?

267 A. In usual cases, yes, sir.

Q. Can you furnish to your counsel or to the Court an example of any letter in which you wrote or recommended or stated that the rules permitted sales at less than the standard rate of commissions adopted by the Board in unusual cases?

A. I can't recall of any letters but, after all, I have been writing letters for years and years and I can't recall.

Q. You testified, I believe, when your counsel was examining you that there was a great deal of confusion as to what the boundary zone was. If any member was free to charge any rate of commission that he pleased, is it not true that there would have been no confusion; would they not have just ignored the red line and gone right ahead?

A. I don't think so because the public generally looked to the Real Estate Board for a standard rate of commission which would be fair and equitable and the Board, having been started back in 1913, had built up a reputation for fair dealing, fair compensation, fair rates, uniform rates, all of those things and the men in the real estate business naturally want to know what is fair and reasonable compensation for services rendered in the usual course of business and the Board, having been the only established real estate association in the District of Columbia at that time—although there was one in 1866 about which I cannot find any records—established the commission boundary
268 zones and set up what it believed would be fair rates for properties in those areas.

Q. Mr. Rush, your counsel referred to the area within the red circular line as the "Downtown area". You didn't mean to indicate your approval of that characterization, did you; for 16th and Decatur was in the red line.

A. We always called it the central city area.

Q. You don't mean to imply that everything within that red line is downtown, do you?

A. Interpret it any way you wish, sir.

Q. As a matter of fact, there are a great many homes and some, I take it, recently built, within that area?

A. I would say very few, sir.

Q. I said some. There are some?

A. I stand corrected.

Q. There are a great many people living there?

A. Yes.

Q. And houses that cost less than $50,000?

A. And many that cost more than $50,000.

Q. In houses?

A. Yes; Massachusetts Avenue and other avenues in there. There are many beautiful mansions in there; Kalmia Circle and so on.

Q. You testified, I believe, that the National Association did not—this was yesterday—did not have anything to do over your affairs, had no control over them at all?
269 A. We are an autonomous organization.

Q. I take it you want to modify your answer of yesterday, don't you? Apparently they do have the authority to define your jurisdiction, do they not?

A. I stand corrected, sir.

Mr. Whiteford: By "jurisdiction," you mean geographical?

The Witness: Geographical, yes, sir.

By Mr. KRAMER:

Q. As a matter of fact, they have jurisdiction to decide whether your members can use "Realtor" which you testified was of such great value?

A. If we pay the dues to the National Association they, in turn, furnish us with a list. There is no investigation based upon that. The local board vouches for its own membership so, therefore, I place it back on the local board, Mr. Kramer.

Q. I want to call your attention to Article 2 of Exhibit 7.

A. That was Article 3, Section 2, of the—

Q. (Interposing) Of the by-laws of the National Association.

A. Yes, sir; what is the inquiry?

Q. You have got it, have you?

A. Yes.

270 Q. The question is, it is true, is it not, that if you should fail to enforce the Code of Ethics—by you I mean the Washington Board—of the National Association, it would have the power to expel you from membership in the National Association, would it not?

A. From this it says so, but I know of nothing along that line. I doubt that I have ever read this Code of Ethics, and I doubt that our members even know that the Constitution and By-laws of the National Association even contains such a paragraph.

Q. Are you suggesting that some member of the Washington Board has violated the Code of Ethics of the National Association?

A. I am not saying that. I say our members do not know that this provision is in the by-laws, Mr. Kramer.

Q. I see. Of course, you can't speak for your membership, but did you know it?

A. I may have, I don't know. In 25 years I have read a lot of things and it doesn't all stay in my memory, sir; I wish it did.

Q. Now, Mr. Rush, while you have got Exhibit 7 in your hand—

Mr. WHITEFORD: Would you give me the benefit of that number? Was it Article 3, Section 7?

Mr. KRAMER: Section 2 of the by-laws. I think you
271 have got the constitution there and that is why you couldn't find it; page 22.

By Mr. KRAMER:

Q. Now, Mr. Rush, I call your attention to—

Mr. WHITEFORD: Let me go back to that once more. The reason I was trying to find it, do I understand you to con-

tend, Mr. Kramer, that the Code of Ethics referred to there is the Code of Ethics of the Local Board?

Mr. KRAMER: No, not at all. It is the Code of Ethics of the National.

Mr. WHITEFORD: That is right.

By Mr. KRAMER:

Q. And the question as asked was, you know of no instance where the Code of Ethics of the National has been violated by members of the Washington Board, do you—or do you?

A. No, I know of none.

Q. And that Code of Ethics in Article 9 provided that the rates or schedule of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor?

A. Should be observed?

Q. I take it, Mr. Rush, that since you have testified that the schedule of fees established by the Washington
272 Board is not at all times observed by members, that you still do not want to change your answer, that you know of no instance where the Code of Ethics of the National Association has been violated?

A. We do not believe that that National Code is binding upon a Local Board on the question of commissions. It is a question of its actions and its attitude with the public, in its transactions with its fellow brokers.

Q. I call your attention, Mr. Rush, to Article 3, Section 1, of the by-laws of the National Association, page 22, and ask you to read that section.

A. Aloud?

Q. Yes, if you will.

A. (Reading): "Each member Board shall adopt the Code of Ethics of the National Association as part of its rules and regulations for violation of which disciplinary action may be taken."

Q. But you know of no disciplinary action that ever has been taken, do you?

A. No, sir. In fact, as I said before, a majority of our members do not know what the National Code of Ethics pertains to. They are not furnished copies by the Washington Real Estate Board and they do not come in to the National and we do not distribute them through our office except on special inquiry. In other words, I mean we
273 do not furnish it upon election of members like we do the Local Board's Code of Ethics.

Q. It is your position, as far as you know, that although each one is a member of the National Association they do not know what the Code of Ethics of the National Association provides. Is that your position?

A. In some cases I would say they do not, because we have two Codes of Ethics; one a Local Board Code, and another a National Code, and that does make a conflict in understanding.

Q. Do you think there is any essential difference between the two Codes and their purpose so far as rates of commission are observed?

You recall the Code of Ethics of the Washington Board, which is Government's Exhibit 5.

I hand you Government's Exhibit 5, the Code of Ethics of the Washington Real Estate Board, and ask you to read Section 3, paragraph 1, and tell me if it doesn't state:

"Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates".

A. You read it, sir.

Q. Now, you take that Article 9 of the Code of Ethics of the National and answer me, after reading it, whether it isn't true that both seek the same there, namely,
274 adherence to a schedule of commissions adopted by the Washington Board?

Mr. WHITEFORD: If your Honor please, if this rate is to be kept up it's all right, but I do not see that any result can be arrived at. It is a question of fact.

If your Honor feels that we want to go into a debate on what this Code means and what the word should mean, I am perfectly willing to do it, but after all Mr. Kramer is asking for an opinion—

The COURT: I think that all that can be done is to point out the provision of the National Code and then the Local Code and then the jury can make the determination.

Mr. KRAMER: Thank you, your Honor. I will cease this questioning.

By Mr. KRAMER:

Q. Now, Mr. Rush, during Mr. Leahy's examination yesterday, you testified that as of June 30, 1947, there were 1,881 real estate broker licenses issued in the District of Columbia, is that correct?

A. I can not remember figures very well at the present time; if we could look at that record there, which was taken from the Real Estate Commission's report, I could testify yes or no.

The Real Estate Commission's report shows 1,881 broker's licenses granted as of June 30th, or for the year ending June 30, 1947, which is the latest published report.

275 Q. You further stated there were 2,480 salesman's licenses granted at that time; is that correct?

A. That is according to this report.

Q. I believe you also testified that there were 400, about, you said, about 450 persons who were in the Washington Board who possessed broker's licenses, is that correct?

A. That is correct.

Q. Now, in addition to the 450 persons who are in the Board, who have broker's licenses, out of that number that you have testified to, how many more licensed salesmen were employed by members of the Board?

A. That I can not answer, sir. There are some—let me check the salesmen here just to give you the number—there were—

Q. (Interposing) 2,480, you said.

A. 2,480 salesmen. We have an associate membership, which is a $5.00 a year affiliate, which has some 240 or 250 salesmen. They are the associate members. These are all of the licensed salesmen who were affiliated with members of the Real Estate Board.

Q. That's what I was trying to bring out.

A. But there are 2,480 licensees.

Mr. Kramer: At this point, your Honor, I would like to offer in evidence a stipulation which I think will end any further necessity for examination on this point. It

276 has been entered into by counsel for all the parties. Should we mark it as an exhibit, if the Court please? I would like to read it to the jury.

The Court: Very well.

Mr. Kramer (reading):

"1. United States of America and the defendants Washington Real Estate Board and National Association of Real Estate Boards, by their attorneys respectively, hereby stipulate and agree that at all times from the formation of the Washington Real Estate Board in 1928 until the date of the return of the indictment in this case (a) the members of the defendant Washington Real Estate Board have been engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia and during said period these members have handled a substantial proportion of the said business and (b) real estate brokers in the District of

Columbia who have not been members of the defendant Washington Real Estate Board have been engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia and have likewise throughout said period handled a substantial proportion of the said business.

"2. The right is expressly reserved to any parties to object on any and all grounds to the admission in evi-
277 dence of any fact stipulated herein.

"3. None of the parties hereto, by entering into this stipulation, shall be deemed to have made any admission of fact or facts for the purposes of any other or different suit or proceeding to which any one or more of the parties hereto may be parties, regardless of whether such suit or proceeding is between two or more of the parties hereto or between one of the parties hereto and any other person or persons."

278 By Mr. KRAMER:

Q. Turning now, Mr. Rush, to Government's Exhibit No. 7, a different part of Exhibit 7 than we have been talking about heretofore, that is, the Constitution and by-laws of the National Association

A. Yes, sir.

Q. I call your attention to Article 2 of the by-laws, Section 1 (c); that is on page 20—

The COURT: Article 2 of the by-laws?

Mr. KRAMER: That is right, your Honor. It is on page 20 of that thick backed one you have in your hand.

The WITNESS: Yes, sir.

By Mr. KRAMER:

Q. That says:

"In January of each year each member board shall file with the National Association a list of its members for whom national dues are payable as defined in paragraph (B), certified by the President and Secretary of the Board, and the—"

and so on.

I take it you have complied with that requirement?

A. Sometimes I have failed to get them in in January; sometimes it would be in February.

Q. But you do collect the dues for the membership of the National Association in Washington?

279 A. The Washington Board collects for the National Association. The Washington Board collects dues from its members and remits to the National Association.

Q. Now, turn to page 12 of that exhibit, Exhibit 7, and look at Sections 1, 2, and 3, of Article 8.

A. Right; I have them.

Q. Is it not correct that the President of the Washington Board casts all the votes of the members of the Washington Board at meetings of the National Association for election of officers therein?

A. If he happens to be present.

Q. But the votes are cast as a group, is that not correct, by the President or the other authorized officer of the Washington Board?

A. When questions come up requiring voting that is the procedure.

There have been innumerable conferences where no votes were cast by local boards as such; it was cast by voice vote and no roll calls of any description, so it would be hard to tell whether or not the President of any particular Board was there, out of four or five hundred boards and 3,000 delegates; you never could tell whether your President was there or not.

Q. But when he is there he is called upon?

A. That is the procedure, yes.

280 Q. Have you any doubt left in your mind now that the Washington Real Estate Board is a member board of the National Association?

A. I would say we were affiliated members of the National Association; that we are affiliated with the National Association of Real Estate Boards.

Q. I call your attention to Section 2, Article 8 of the constitution, and ask you whether or not the Washington Real Estate Board—

The Court: Article 2 of what?

Mr. Kramer: Excuse me; Section 2 of Article 8 of the constitution of the National Association, on page 12 of Exhibit 7.

By Mr. Kramer:

Q. I ask you, is the Washington Board in the category of member board, as that word is used in that section?

A. It appears to be, Mr. Kramer.

Q. I hand you, Mr. Rush, Government's Exhibit No. 3, being the constitution and by-laws of the Washington Board, and call your attention to Article 2 thereof, "Objects," and ask you to tell me which one or more of the objects of the Washington Real Estate Board was being furthered when you changed the rates of commission in 1943 and 1944?

A. I think the third and fourth.

Q. Which ones were those?

281 A. "To maintain among the brokers of Washington a high standard of business methods and integrity; to foster a spirit of co-operation and of fair and honorable competition:

"To assure to the public the services of responsible and trustworthy agents and brokers, acting upon definite and uniform standards of contracts and charges, with the view of protecting the interests of all the parties."

That has been our objective, sir, all through the years.

Q. You want the jury—this is important—your objective in making those changes was to have definite and uniform standards of contracts and charges, with a view—

Mr. LEAHY: I object.

Mr. KRAMER: I withdraw the question. No further examination, your Honor.

The COURT: Very well; step down.

Mr. LEAHY: May I have one question to clear up one matter?

Re-cross Examination.

By Mr. LEAHY:

Q. You were asked, Mr. Rush, if you had ever received any letters or requests from members with regard to what was the standard rate of commission of the Board, and whether they could charge less, and I think the an-

282 swer was that you had written and told them that in your judgment they ought to maintain the standards, in the ordinary, everyday case. Is that right?

A. That is substantially correct, sir.

Q. Let me ask you this, Mr. Rush.

Isn't, as your last answer just given indicated, that the sole purpose which the Washington Board had in fixing a standard rate by advising its members, and the public, that a rate had been accepted generally throughout the city as fair compensation to the public and to the members of your Board, and that was a standard which should be observed in the ordinary case?

A. Yes, sir.

Q. That's all.

A. It is a standard.

Q. Do you know whether that standard is also accepted by the non-members of your board generally throughout?

Mr. KRAMER: Objection, your Honor. He can't possibly know what the non members do.

Mr. LEAHY: Oh, yes, he can: that is his business to know.

The COURT: If he knows of his own personal knowledge.

Mr. LEAHY: If you know.

Mr. KRAMER: Do you mind if we find out the basis of his knowledge?

283 By Mr. LEAHY:

Q. You know other resident brokers here in town who are non-members of your Board?

Mr. KRAMER: How would you know?

The WITNESS: Because they come up to see me and ask for information and copies of the schedules of commissions; the courts do, the newspapers do.

There is a colored real-estate brokers' association here in the District of Columbia, the Washington Real Estate Brokers Association, a mighty fine group of negro folks, and they use the same standard rate of commissions. They are not affiliated with us.

Mr. KRAMER: I object to that. It has no relevancy whatever.

Mr. LEAHY: It has this relevancy.

By Mr. LEAHY:

Q. Isn't this just a recommended standard for public information and the information of your brokers?

A. Yes.

Q. On the individual case your broker can charge what he wants, provided the seller or the purchaser agrees to it, isn't that right?

A. That is right.

Q. You were asked if you knew of any case in which they did take less than this so-called standard. You know

284 of many, don't you?

A. I do. There was one particular case where a commission was paid by the court, or the court issued an order, paying less than the standard rate. That has been done in innumerable trust sales, although the courts generally adhere to the 5 per cent.

Q. Isn't it common knowledge in your business, in this real estate business, that these developments for veterans, that where an owner builds fifty or sixty houses, that the brokerage fee is fixed at whatever the cost of the house will permit?

Mr. KRAMER: Fix the time on that, please.

A. It is $100 a house.

By Mr. Leahy:

Q. $100 a house, regardless of what it cost?

A. Regardless of the cost.

Q. Because it isn't an ordinary usual transaction. There is a man on the job; there the houses are all alike; some fifty or sixty, and people coming in and looking for them, and they charge a regular price?

A. Yes, sir.

285 Q. And they pay a regular commission which is $100?

A. Yes; they pay a commission of $100.

Q. Did your board ever fire anybody for ever doing that?

A. No, sir.

Q. Or discipline anybody?

A. Never.

Q. Or complain about it?

A. Never complained about it.

Q. Did you ever try to impose upon anyone who was not a member of your Board, any broker, for not, according to the standard you fix, charge the commissions or rates that you fixed?

A. No, sir. That would be rather presumptuous.

Q. And you never attempted to?

A. No, sir.

Q. And you never attempted to control an owner of property? If he wanted to sell his property, he could?

A. Yes, sir.

Q. You never did anything with these builders who were building these large veterans' projects. And you never blacklisted them?

A. We cooperated and helped the veterans.

Q. You didn't start a picket line and say, "Unfair to the Washington Real Estate Board," did you?

286 A. No, sir, but we have been picketed.

Mr. Leahy: That is all.

(Witness excused.)

The Court: We will take a short recess at this time.

(A short recess was taken.)

Mr. Kramer: Mr. Kelly will examine Mr. Baker.

Mr. Kelly: Call Mr. Baker.

Thereupon—

LOWELL BAKER was called as a witness on behalf of the United States and, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. KELLY:

Q. Mr. Baker, will you please state your full name, please?

A. Lowell Baker.

Q. Where do you reside?

A. 274 Ridge Avenue, Winnetka, Illinois.

Q. What is your business address?

A. 22 West Monroe Street, Chicago.

Q. What is your present business or occupation, Mr. Baker?

A. I am the administrative secretary of the National Association of Real Estate Boards.

Q. Administrative Secretary?

A. Yes, sir.

287 Q. And does that mean, Mr. Baker, that there are other types of secretaries with the National Association?

A. Yes.

Q. What other types does the National Association have?

A. There is a corporate secretary.

Q. Who is the corporate secretary?

A. Herbert U. Nelson.

Q. Are there other types of secretaries; executive secretary?

A. Of various departments of the association.

Q. Does Mr. Nelson have any other title, other than corporate secretary?

A. Yes; he is the executive vice-president.

Q. Do you know Carrie M. Jones, Mr. Baker?

A. Yes.

Q. Who is Mrs. Jones?

A. She is our librarian.

Q. Of the National Association?

A. Of the National Association of Real Estate Boards.

Q. I take it the National Association of Real Estate Boards is a corporation?

A. Yes; it is an Illinois corporation.

Q. Mr. Baker, will you explain to the Court and to the members of the jury the various types of members which the National Association has?

288 A. We are a Federation of local boards, local real estate boards. Our realtors are affiliated with each one of the local boards. Membership in the National Association consists of individuals, firms, corporations and partnerships engaged in the real estate business.

Q. Mr. Baker, you do have certain specific types of membership, is that correct?

A. Yes; not as types but who are qualified.

Q. Will you enumerate those for us, please?

A. I just have.

Q. In other words, do you have member boards?

A. Yes; we have a federation of member boards.

Q. Do you also have board members?

A. Yes, sir.

Q. Do you have individual members?

A. We have individual members in the various States where there is no local jurisdiction, that is, jurisdiction for a local board.

Q. In other words, as I understand it, where there isn't any local board in any given locality a person and an individual may apply for membership, is that correct?

A. May apply to the National Association for membership, yes, sir.

Q. Do you also have property members?

A. No, none of those exist.

289 Q. Does your constitution provide for property owner members?

A. Our constitution does provide for them, yes.

Q. Mr. Baker, how does a real estate broker in the District of Columbia apply for membership in the National Association of Real Estate Boards?

A. There was a noise and I didn't hear the first part of your question.

Q. How would a real estate broker in the District of Columbia apply for membership in the National Association of Real Estate Boards?

A. He would first file his application with the local board.

Q. That is, with the Washington Real Estate Board?

A. With the Washington Real Estate Board and, if he were qualified for membership, then by virtue of that qualification and recommendation from the local board the National Association would accept that membership.

Q. In other words, do I understand correctly, by virtue of his becoming a member of the Washington Board, he automatically becomes a member of the National Association?

A. No; upon recommendation of the Washington Board.

Q. Upon recommendation of the Washington Real Estate Board?

A. Yes, sir.

290 Q. Mr. Baker, is the Washington Real Estate Board a member board of the National Association of Real Estate Boards?

A. Yes.

Q. It is a member board?

A. Yes.

Q. Can you tell us when the Washington Board became a member of the National Association?

A. I cannot.

Q. Of your own knowledge?

A. Of my own knowledge, I cannot.

Q. Can you tell us what the annual dues are for a member board?

A. There are no annual dues for a member board.

Q. That applies to all member boards, does it not?

A. That applies to all of them.

291 Q. What are the annual dues of the Board members?

A. $10.00, payable to the National Association of Real Estate Boards.

Q. $10.00 a year?

A. $10.00 per year, yes, sir.

Q. Payable to the National Association through the Local Board?

A. That is right.

Q. Is that correct?

A. Yes, sir, that is right.

Q. Can you tell us, Mr. Baker, how many members you have on the rolls of the National Association? That is, your total membership.

A. In excess of 42,000.

Q. Breaking that down, how many member boards do you have?

A. In excess of 1,040.

Q. Can you tell us when during the year the dues are remitted by the Local Board to the National Association?

A. They are on an annual basis.

Q. Can you tell us what the annual budget of the National Association is?

A. This year it was $400,000.

Q. What was it in 1946?

Mr. LEAHY: I object as immaterial.

292 THE COURT: I don't see the pertinency of this.

Mr. KELLY: Well, if your Honor please, I think it is pertinent because we want to know that the National Association has funds to carry on their work.

THE COURT: We would hope they did.

Mr. KELLY: We would like to find out just how much that is, Your Honor.

THE COURT: What difference does it make?

Mr. KELLY: Very well.

By Mr. KELLY:

Q. Mr. Baker, how long have you been in your present job as Administrative Secretary?

A. Since January 6, 1944.

Q. And prior to that date what was your business or occupation?

A. I was the manager of the Office of Decentralization Service for the Public Buildings Administration.

Q. And how long did you hold that position?

A. Two years.

Q. And prior to that what was your position?

A. I was with the firm of Wirtz, Haynie & Ehrat, in Chicago. They were real estate people.

Q. That is a real estate firm?

A. Yes.

Q. Was that firm a member of the National As-
293 sociation of Real Estate Boards?

A. Yes.

Q. How long were you associated with that firm, Mr. Baker?

A. Twelve and a half years.

Q. During that time did you have any connection with the National Association of Real Estate Boards?

A. Yes.

Q. What was the basis of that?

A. I was a member of the Chicago Real Estate Board.

Q. And by reason of that fact did you hold any position with the National Association?

A. No, sir.

Q. Prior to 1944?

A. No, sir.

Q. In other words, your first official capacity with the National Association was January 6, 1944?

A. Yes, sir.

Q. Mr. Baker, I will hand you a copy of Government's Exhibit 7 in evidence, which is the constitution and by-laws

of the National Association, and ask you whether you are familiar with that?

A. Yes, I am.

Q. Can you tell the Court and the members of the jury how the National Association distributes that pamphlet which contains its constitution and by-laws?

294 A. Well, we send one to each member board and one to each State Association that we have.

Q. Do you send one in addition not to your individual members, but to the Board members?

A. That is generally distributed through the Local Board, and that is optional.

Q. That is optional with whom?

A. With the Local Board.

Q. Can you tell us, Mr. Baker, how many active members the National Association had prior to August, 1947?

A. Well, there was in excess of 36,000, I believe.

Q. In excess of 36,000?

A. Yes.

Q. Mr. Baker, if you will turn to page 22 of the Constitution and by-laws which you are holding there, and refer to Article 3, Sections 1 and 2; Section 2 states:

"Any number Board which shall neglect or refuse to maintain the Code of Ethics with respect to the business activities of its constituent members may, after due notice and opportunity for hearing, be expelled from membership in the National Association by the Board of Directors."

I will ask you, if the Washington Real Estate Board should flagrantly disregard the Code of Ethics of
295 the National Association of Real Estate Boards, could action be taken against the Washington Real Estate Board under that section?

Mr. WHITEFORD: I object to the question as calling for an opinion, and it is indefinite and uncertain.

The COURT: Sustained. Not what could be done; what was done, if anything.

Mr. KELLY: I will reframe that.

By Mr. KELLY:

Q. Has any action, disciplinary action, ever been taken against the Washington Real Estate Board?

A. Never, to my knowledge.

Q. Mr. Baker, has it ever been brought to your attention that the Code of Ethics of the National Association has ever been violated?

Mr. WHITEFORD: You mean by whom?

Mr. KELLY: By the Washington Real Estate Board.

Mr. LEAHY: Are you assuming that it has been, in your question? I object to it.

A. No.

The COURT: I will let him answer.

The WITNESS: No.

By Mr. KELLY:

Q. Under that section, Mr. Baker, do you ever have any reports of violations of your Code of Ethics?

Mr. WHITEFORD: By whom?

296 Mr. KELLY: By any members, Mr. Whiteford.

Mr. WHITEFORD: I object to that.

The COURT: Sustained.

By Mr. KELLY:

Q. I will show you Government's Exhibit 6 in evidence, which is the Code of Ethics of the National Association of Real Estate Boards, and ask you, Mr. Baker, if you are familiar with that Code of Ethics?

A. Yes.

Q. Would you explain to the jury how that Code of Ethics, or the copies of the Code of Ethics, are distributed by the National Association to the various members?

A. Similarly to the distribution of the constitution and by-laws by the National Association.

We distribute them to the member Boards and our State Associations, and they in turn distribute them to their members at their option.

Q. When you assumed your duties as Administrative Secretary of the National Association, in January of 1944, Mr. Baker, what committees, if any, were constituted and set up by the National Association to carry on its functions?

A. Well, we had several committees. I may not be able to recall them all to you, because the committees vary from time to time, but I believe I can tell you, the Realtors Washington Committee, which was one of the committees

297 that was set up.

Q. At that time do you recall the Committee on Rates, Rules and Customs of the National Association?

A. I recall a committee similar to that; I was wondering whether that was the complete designation of it.

Q. It was in existence in 1944, is that right?

A. Yes, I think it was.

Q. Do you know, Mr. Baker, when the Committee on Rates, Rules and Customs was first set up—

A. No.

Q —by the National Association?

A. No.

Q. You do not of your own knowledge?

A. No.

Q. I take it, then, you first knew of the existence of this committee when you assumed your duties in 1944?

A. That is right.

Q. Can you tell us, Mr. Baker, what were the purposes of the Committee on Rates, Rules and Customs?

Mr. WHITEFORD: I object to it unless there is some record of it, or some action, or he made the appointment.

The COURT: I will sustain the objection.

Mr. KELLY: If your Honor please, Mr. Baker being the Administrative Secretary of the National Association, he certainly should be familiar with the purposes.

298 By Mr. KELLY:

Q. Do you know what the purposes were?

The COURT: Do you know of your own knowledge what the purposes were?

The WITNESS: I know the designation that I had on my agenda for work with them, yes.

By Mr. KELLY:

Q. I think if you would tell us that, it would answer the question.

A. We were dealing with ethics and arbitration at the time.

Mr. WHITEFORD: Ethics and arbitration?

The WITNESS: Yes.

By Mr. KELLY:

Q. What time was that, Mr. Baker?

A. The time?

Q. Yes; I mean when were you dealing with the ethics and arbitration?

A. You are referring to 1944?

Q. Yes.

A. 1944.

Q. During the entire year of 1944?

A. Yes.

Q. When you state the Committee was dealing with ethics can you explain that to us, Mr. Baker, of your own knowledge?

299 Mr. WHITEFORD: One moment. Were you a member of the Committee?

The WITNESS: No, sir.

Mr. WHITEFORD: Then I submit—

The COURT: Unless he knows in his official capacity, as Administrative Secretary—do you know?

The WITNESS: Only from minutes. I had the review of the minutes.

Mr. KELLY: I think he should answer.

The COURT: You have reviewed the minutes, you say?

The WITNESS: Yes, sir.

The COURT: As to the purpose of this Committee?

The WITNESS: Of their action. I believe that was the question Mr. Kelly raised.

The COURT: You mean the action they took—that is not the question.

Mr. KELLY: I asked you what the Committee did with regard to ethics. You said that the Committee was concerned with ethics and arbitration during 1944.

The COURT: If you want any action taken by the Committee why don't you produce the minutes of what was done by the National Council—

Mr. KELLY: We intend to do that.

The COURT: —and not ask this witness.

Mr. KELLY: I will withdraw that question.

300 By Mr. KELLY:

Q. Do you know, Mr. Baker, whether or not a committee on Rates, Rules and Customs was in existence in the year 1945?

A. Yes, I believe it was.

Q. Could you tell us who was Chairman of the Committee during that year?

A. I believe it was Mr. Todd.

Mr. WHITEFORD: 1945?

Mr. KELLY: 1945.

Mr. WHITEFORD: What is the purpose of that date? The two matters you complain of that happened in Washington were February, 1943, and December, 1944.

Mr. KELLY: If your Honor please, we have alleged this is a continuing conspiracy to fix rates.

The COURT: I will let him answer.

The WITNESS: It was a Mr. Leon Todd.

By Mr. KELLY:

Q. Leon Todd was Chairman during the year 1945 of this Committee on Rates, Rules and Customs?

A. Yes, sir, to the best of my recollection.

Q. To the best of your recollection, Mr. Baker, in the year 1946, was the Committee on Rates, Rules and Customs of the National Association in existence?

A. Not as such. I believe that that was changed at that time, and there was a division. There was a Committee on Professional Standards set up and a Committee on Rates and Rules. I believe that was the rate that was designated.

Q. In 1946?

A. Yes, sir.

Q. Did that committee function in 1946?

A. No.

Q. It did not function?

A. No, sir.

Q. Can you tell us, Mr. Todd, of your own knowledge why that Committee did not function in 1946?

Mr. Whiteford: I object.

Mr. Leahy: I object as immaterial.

The Court: Sustained.

By Mr. Kelly:

Q. Mr. Baker, did you receive a visit in March, 1946, from an employee of the Department of Justice?

A. Yes.

Q. In Chicago?

A. Yes.

Q. Did you receive a further visit, or another visit, in July of that year?

A. I am not clear on the date, but I know definitely we had two visits.

Q. You had two visits in the year 1946?

A. Yes, sir.

Mr. Kelly: If the Court please, we have no further questions at this time.

Mr. Whiteford: I only have one question, and I don't think that is very important. Perhaps Mr. Baker may know it, but I am a little confused as to his testimony about the payment of dues, if it has any bearing.

Cross Examination.

By Mr. Whiteford:

Q. Isn't it a fact that the constituent board members—boards, I am talking about, member boards—they are responsible to the Management Association in dues at the rate of $10.00 per capita of their members?

A. Of their active members.

Q. And they pay that without regard to whether they have collected it from their own members or not? They pay it out of their own treasury: that is the way that is paid?

A. No.

Q. Do some of them assess and some do not?

A. That is right.

Q. Aren't there some boards in the United States, members of which do not pay any dues?

A. Yes, there are several boards in the United States that the members themselves don't pay the dues.

Q. The Board pays them to the National Association?

A. Yes, sir.

303 Q. $10.00 per capita?

A. Yes.

Q. And that is what you meant by that $10.00?

A. Yes.

Mr. WHITEFORD: That is all.

Re-direct Examination.

By Mr. KELLY:

Q. Mr. Baker, then the Board member, or the member Board, rather, remits the dues to you.

It has been testified here that the Washington Real Estate Board has approximately 257 members. Am I correct then in stating that the annual dues payable to the National Association by the Washington Board would be some $2,570? Is that correct?

A. Approximately.

Mr. KELLY: Thank you.

Mr. LEAHY: No questions.

The COURT: If you don't need this witness any more I would like to excuse him.

Mr. KRAMER: Yes, you may excuse him, so far as the Government is concerned.

The COURT: You may be excused.

(Witness excused.)

Mr. KRAMER: Call Herbert U. Nelson.

Thereupon,

304 HERBERT U. NELSON was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. KRAMER:

Q. Please state your name.

A. My name is Herbert U. Nelson.

Q. Where do you live?

A. I live in Winnetka, Illinois.

Q. And where do you work?

A. I work mostly in Chicago, where the headquarters of my Association are, and also here where we have a sub-office.

Q. You have an office here in Washington, a sub-office?

A. That is right.

Q. And what is the address of that office?

A. 1737 K Street, Northwest.

Q. And how long has it been established?

A. Since 1941.

Q. You spend part of your time here and part of your time in the Chicago office, is that it?

A. Well, I travel a great deal.

Mr. KRAMER: Will you please read the question, Miss Reporter?

305 The WITNESS: I will say yes.

By Mr. KRAMER:

Q. What is your present position, Mr. Nelson?

A. I am Executive Vice President and the Corporate Secretary of the Association.

Q. What Association?

A. National Association of Real Estate Boards.

Q. How long have you held that position?

A. Twenty-six years.

Q. That would be what?

A. 1922.

Q. Since 1922?

A. Yes, sir.

Q. Do you know when the National Association of Real Estate Boards was incorporated?

A. I am not sure. It was organized as a voluntary Association in 1908, and I think it was incorporated maybe the first time in—it should have been in 1918, or thereabouts.

Q. I apologize to you, sir. I had the answer right here myself; Exhibit 7 (handing exhibit to witness), does that refresh your recollection that you were incorporated July 7, 1908?

A. That is right.

Q. When did you become Executive Vice Presi-

306 dent of the National Association?

A. Well, my first designation was Executive Secretary, and then later on—

Q. Let's go through each position separately.

A. That was in 1922.

Q. And you held that until when?

A. Then the designation was changed at convention in Pittsburgh, I think in 1934 or 1935.

Q. At any rate, somewhere around 1935 your position was changed to that of Executive Vice President?

A. That is right.

Q. And Corporate Secretary

A. I have always been Corporate Secretary since 1922.

Q. Can you tell us what the duties of the Executive Vice President of the National Association of Real Estate Boards are?

A. They are set forth in the constitution.

Q. Will you find that for me, please.

A. (Reading) "There shall be an Executive Vice President who shall be appointed by the Board of Directors. He shall be the Chief Administrative Officer of the Association, subject to the President, and the head of the staff charged with its elections, except the Directors of the three Departments provided for in Section 13, sub-
307 ject to the approval of the Executive Committee. He shall have supervision of the entire staff and shall perform such other duties as may be delegated to him by the Board of Directors, the Executive Committee Board, and all other duties usual to such office."

And then it goes on to provide for a bond, and so on.

Q. You are bonded?

A. Yes, sir.

Q. Do you have charge of the records of the National Association, I mean the corporate records? As Corporate Secretary do you keep the minutes?

A. Yes, technically so. It is a delegated function.

Q. How do you keep the minutes? Do you keep them verbatim?

A. No, very rarely. They are summarized and I look at them; that's about all there is to it.

Q. If there is a mistake in them you correct them and have them re-done; is that it?

A. Yes.

Q. Calling your attention to the year 1935, did you know in that year Mr. Joseph Laronge?

A. Yes, indeed.

Q. Was he a Realtor?

A. Yes, indeed.

Q. Do you remember whether or not he served on
308 any committees of the National Association of Real Estate Boards?

A. Well, I would have to see the record. We have 109 directors, but he was a director, and about that time, or subsequently, he was our National Treasurer.

Mr. KRAMER: Please mark that for identification as Government's Exhibit 29.

(Letter dated February 28, 1935, from Herbert U. Nelson to Mr. Laronge marked for identification Government's Exhibit No. 29.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit No. 29 for identification, and ask you to read it and tell me if that refreshes your recollection as to whether or not Mr. Joseph Laronge was in 1935 on any committees of the National Association, and if so, which ones?

A. Well, I don't know from this letter whether Mr. Laronge was a member of any Committee at that time or not.

Q. Can you tell that without even reading it. Is that it?

A. I say I don't know whether he was a member.

Q. And you know now that even if you read the letter you won't know?

A. You want me to read it?

Q. Read it to yourself and see if it refreshes your
309 recollection.

Mr. WHITEFORD: That Mr. Laronge was a member of a committee?

Mr. KRAMER: As to whether or not he was a member of any committee of the National Association. I refer particularly, Mr. Nelson—perhaps I should have said this before, I am sorry if I didn't—to the second full paragraph on page 2.

A. That doesn't inform me whether in 1935 Mr. Laronge was a member of any committee or not; I still don't know.

By Mr. KRAMER:

Q. The answer is, no, you don't remember?

A. I do not remember.

Q. Returning Government's Exhibit for Identification No. 29 to you, I will ask you if you can recognize, without reading to the jury, what the handwriting is?

The COURT: What handwriting?

Mr. KRAMER: The top right-hand corner of the letter.

By Mr. KRAMER:

Q. And tell me in whose handwriting that is, if you know.

A. No, I don't know.

Q. Is Government's Exhibit 29 a photostatic copy of a carbon copy of a letter you wrote to Mr. Joseph Laronge on February 28, 1935?

310 A. Yes, sir, so far as I know.

Mr. KRAMER: I move the admission in evidence, if the Court please, of Government's Exhibit 29 for identification.

The COURT: What is the purpose of it?

Mr. KRAMER: We desire to show the background of the National's Committee on Rules, Rates and Customs, and because I anticipated, if the Court please, that there might be some doubt in your Honor's mind, I have prepared a memorandum on this matter, which I would like to submit to you and counsel on the other side, if you think it is needed.

The COURT: You have prepared a memorandum on why this letter should be admitted?

Mr. KRAMER: This and succeeding documents of the same character. I anticipated that counsel will object.

The COURT: Counsel hasn't objected yet. I am making inquiry. This is a carbon copy of a letter sent by Mr. Nelson, as Secretary of the National Council, to Mr. Joseph Laronge, in which he says:

"Personally I have long favored adoption by all of our Boards of a uniform statement or basis on commissions."

That's all it says. What do you expect this letter is going to show? What purpose is it going to serve?

Mr. KRAMER: I think it will assist the jury in ascertaining—

311 The COURT: It doesn't bind the National Council, does it?

Mr. KRAMER: I don't know what your Honor has in mind by binding them. It is certainly admissible against them as the statement of an officer.

The COURT: What he personally admits?

Mr. KRAMER: How else can we find out, if the Court please, what a corporation thinks except by the acts of its officers?

The COURT: There is a certain way that it is approved, isn't there? A corporation just doesn't act through a personal individual. He is not authorized to do anything he wishes. There is a Board of Directors to a corporation, isn't there?

Mr. KRAMER: I assume there is in this case.

Is it your position, your Honor, that no statement contained in a letter by Herbert U. Nelson can be admitted in evidence unless we are prepared to show that the Board of Directors saw that letter and approved of it?

312 The COURT: Of course, that is what I am going to hold. Any personal letter written by a corporation is not binding on the corporation unless the organization is so set up that it must be approved by somebody and, in this letter, Mr. Nelson goes so far as to say, "Personally, I have long favored adoption by all of the boards of a uniform statement or basis of commissions."

You want to admit that evidence as binding on the National Association?

Mr. KRAMER: I am perfectly willing to strike that sentence but I would like to read to your Honor, if I may, a statement of the Supreme Court in Hitchman Coal & Coke Company vs. Mitchell, 245 U. S. 229.

"It is objected that these proceedings, especially in so far as they include the declarations and conduct of others than the answering defendants, are not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence *aliunde*."

That means apart from the declaration. The people who were speaking were members of the trade union at a meeting of the trade union and there was a stenographer present taking down the notes.

"The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by in-

313 dependent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful."

If I may interpose for a moment, that was the purpose of this testimony this morning to show you the relationship between the National Association and the local board. I was attempting to lay the foundation to show the existence of a combination; not yet an unlawful combination.

The COURT: The only thing that concerns me is this is a letter written by a secretary in which he personally expresses his opinion for uniform commissions. You want to admit that letter written by the secretary whereby he expresses his personal feelings as binding upon the defendant, the National Association?

Mr. KRAMER: I am perfectly willing, if your Honor please, to go over the letter—not in the presence of the jury unless your Honor wishes—and take out anything that consists solely of the personal expression of the witness.

Mr. WHITEFORD: Let me call your attention to where this will go. If this kind of a statement is admissible as to a philosophy that Mr. Nelson had in 1935 then contrary philosophies that other officers and other operating heads, shall we say, of this company that may have been made contrary to that are all admissible. We will be trying here philosophies and statements and personal opinions from now to Kingdom come.

I am very sure, Mr. Kramer, if he found any letter when he went out to Chicago and went through our files, if he found anything that was contrary to the position that he has taken here, he would not be bringing it here. You are bringing it here because you think there is something in here that supports a superior philosophy that you have with respect to this action. Nothing had happened in Washington at that time.

You complain of two things; that the District Board has done, to-wit, the fixing of their rate in February of 1943 and again in December of 1944. That is what you call it. I adopt your terms. I don't agree with it.

How you can expect to go back—and I will take you back here to a speech that Mr. Nelson made on the real estate code of ethics twenty years before that, and if you would like me to put that in evidence, I will put that in with the same degree of reasonableness as you ask for this.

Mr. KRAMER: May I inquire, if your Honor please, is your objection only that it goes too far back or that it would not be admissible if it were dated 1946?

Mr. WHITEFORD: Mr. Kramer, I don't know what theory you have in mind. I can't quite follow the reasoning that prompts you to offer it.

This is a discussion, let's say, of 'architects' contracts in this letter. What has that got to do with what the National Association has alleged to have done in Washington?

Mr. KRAMER: Nothing.

Mr. WHITEFORD: Nothing in the world.

Mr. KRAMER: I will exclude that if you want to take it out.

Mr. WHITEFORD: Why do you want to talk about that?

We will produce carloads of discussions on rates, fees, charges, ethics, activities of this association. Three million pieces of mail go out of this association every year. Now, you want to pick out one of them here and talk about it.

Mr. Kramer: I want to show, if your Honor please, this is the officer of the National Association of Real Estate Boards who conceived the idea of the Committee on Rates, Rules and Customs.

The Court: I don't know whether he conceived it or not.

Mr. Kramer: This letter will prove it if you will admit it in evidence.

The Court: It won't prove any such thing that he conceived the idea.

Mr. Kramer: May I go on with the oral examination and come back to this? I have a memorandum prepared.

The Court: You anticipate that the Court might not admit the letter?

Mr. Kramer: I anticipated, after your rulings yesterday, that I am going to have to be much clearer on the
316 law than I was prepared to be and, consequently, to the impairment of the health of our staff we stayed up late last night getting up on the law.

The Court: If I had known that, Mr. Kramer, I certainly would have let you have the time to do it without injuring the health of the staff. Had you requested me to extend sufficient time to you in which to prepare a memorandum, I would gladly have given it to you.

Mr. Kramer: I was being facetious and I should not have been.

The Court: I will take a recess and you can submit your memorandum on points and authorities. You say you have a memorandum?

Mr. Kramer: Yes, I have.

The Court: Will you furnish me with a copy and furnish counsel with a copy?

Mr. Kramer: Yes, your Honor.

(Thereupon, at 12:25 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

317 Afternoon Session

(The trial was resumed at 1:45 o'clock p. m., pursuant to the taking of the recess.)

Mr. Kramer: Are you ready to have Mr. Nelson resume the stand?

The Court: Yes.

Thereupon,

HERBERT U. NELSON resumed the witness stand and was examined and testified further as follows:

Mr. KRAMER: If the Court please, at the noon recess I told the Court we would like to submit a memorandum. I find that we have submitted two memoranda, one on the precise question that I was raising at the time we recessed and the other an attempt to set forth, in a little more detail than we have in these remarks I have made orally during the trial thus far, the theory of the Government's case against the National Association. That is why the two memoranda. The first applies to the specific point only of these communications by Mr. Nelson. The second is of more general application and is submitted, as I have said; for the purpose of trying to give the Court our slant, our pitch, as your Honor put it, of the case against the National Association, we have proved and expect to prove.

Does your Honor want me to go on and leave the
318 decision as to the admissibility of Government's Exhibit 9 in abeyance?

The COURT: I suggest you do that.

Mr. KRAMER: All right. I would like to ask the witness some questions about the exhibit without, if possible, revealing to the jury the contents of the letter.

Direct Examination (continued).

By Mr. KRAMER:

Q. I hand you Government's Exhibit for Identification 29 and ask you if that refreshes your recollection that at that time you had in your possession a compilation of all the rates that were being charged as standard, at least by member boards throughout the country?

Mr. WHITEFORD: I object.

The COURT: I will let him answer the question.

The WITNESS: No; I don't think we had them all. We had some of them.

By Mr. KRAMER:

Q. You had some of them?

A. Yes.

Q. Mr. Nelson, do you know where that compilation is now?

A. Well, we have a library in which we collect all sorts of publications and data from real estate boards from all sources. We have 3,300 library headings on subjects that have to do with real property and it is our duty to
319 try to keep that as complete as possible.

Mr. KRAMER: Would you please read my question to the witness?

(The question was read by the reporter.)

The WITNESS: The compilation of this date?

By Mr. KRAMER:

Q. Referred to in the first paragraph of that exhibit which you now have.

A. No, I do not.

Q. You do not?

A. No.

Mr. KRAMER: I call upon counsel to produce it if they have it.

Mr. WHITEFORD: Of course, that is a perfectly silly thing. If you will read the next sentence you will find that he is referring to the Real Estate Journal where a whole lot of this thing is in there.

Mr. KRAMER: I move the admission of the first paragraph of that letter in view of counsel's remarks.

The COURT: I will admit it.

(The first paragraph of Government's Exhibit 29, previously marked for identification, was received in evidence.)

Mr. KRAMER: The first paragraph of this letter reads as follows:

3207 "Dear Joe:

"We have a compilation of the commission rates which is very bulky and voluminous covering most of the cities in the country. I think perhaps, for your purpose, a part of this complete study which was published in the Real Estate Journal covering all cities of 1,000 population and over might be better. This appeared in the Roster Issue of April, 1932, page 53. We plan a similar issue in the next two or three months so as to incorporate the changes The changes, however, are relatively few."

By Mr. KRAMER:

Q. Mr. Nelson, this roster issue that is spoken of of the Real Estate Board was a publication that was available to any member of the public that wanted it, was it not?

A. Yes.

Q. And it was at that time published by the National Association of Real Estate Boards?

A. No, sir.

Q. It was not at that time?

A. No, sir.

Q. You are confident that the Real Estate Journal was not published by the National Association of Real Estate Boards in 1932?

A. I am quite sure.

Q. I will proceed to another line of inquiry, Mr. Nelson, and then come back to this.

321 Mr. WHITEFORD: The date of the letter was 1935.

Mr. KRAMER: I was referring to the roster issue of April 1932.

The COURT: Your question to him has nothing to do with the roster issue. Your question was whether or not the National Association of Real Estate Boards published the Real Estate Journal, wasn't it?

Mr. KRAMER: That is right, yes.

The COURT: And the witness said "No".

By Mr. KRAMER:

Q. Is the roster issue a part of the Real Estate Journal?

A. It is a part of the Real Estate Journal but we have never published it.

Q. You never have?

A. So far as I know, we never have.

Q. Do you know whether the National Association of Real Estate Boards gave copies of the Roster Number 4-19-32, to all members?

A. We at that time—

Mr. WHITEFORD (interposing): One moment. I object to that. What point can be proved by whether or not the National Association bought a magazine and sent it to its members any more than it bought the Ladies Home Journal or the Saturday Evening Post?

322 The COURT: Are you referring now to the Real Estate Journal?

Mr. WHITEFORD: Yes; the publication of the Roster in the Real Estate Journal in 1932.

The COURT: You want to know now if the National Association published the Real Estate Journal; is that your question?

Mr. KRAMER: No. I want to withdraw the question in view of counsel's statement, your Honor.

The COURT: All right.

By Mr. KRAMER:

Q. Did you submit the material for the publication in this Roster Issue Journal to it for publication?

Mr. WHITEFORD: To whom?

Mr. KRAMER: To the publishers, whomever they might be.

Mr. WHITEFORD: I object.

The COURT: I will let him answer.

The WITNESS: It did not work quite that way. They came to our office and copied our membership lists and they had access, as almost anybody does, to our library on any information concerning our association or its members.

By Mr. KRAMER:

Q. Then in the next to the last sentence of the first paragraph of Government's Exhibit 29, you say you were mistaken when you made the statement "We plan a similar issue in the next two or three months"?

323 A. The editor of the journal came and talked to us and we made plans about a roster issue and things of that kind. Naturally, they would have to consult us.

Q. That is all I had in mind.

A. They would consult us, coming into our office.

Mr. WHITEFORD: May we have for the record what is meant by "roster"? I don't know.

By Mr. KRAMER:

Q. Yes. Will you tell the jury what is meant by the roster issue?

A. Yes, sir. For many years, Mr. Kramer, the National Real Estate Journal has, once each year and usually in March, published a complete list of all of our real estate board members and that is called the roster issue.

324 Q. Once a year it publishes that?

A. Yes. That does not go now, and hasn't for some years, to all our members, however unless they are subscribers to the National Association.

Q. There was a time apparently it was around in this period when you did send it to them out of their dues, but you stopped that?

A. There was a time when our association bought a subscription for $2 for each one of our members, but we were not the sole subscribers.

Mr. KRAMER: I understand; thank you very much.

Mr. Clerk, will you please mark this Government's Exhibit 30 for Identification?

(Letter dated September 4, 1935, from Herbert U. Nelson to Morton J. Luchs, marked for identification Government's Exhibit 30.)

By Mr. KRAMER:

Q. Mr. Nelson, I hand you Government's Exhibit 30 for Identification and ask you if you know whose handwriting that is between the word "Sincerely" and the word "Secretary"?

A. This (indicating)?
Q. Yes.
A. It looks like mine; it is just a scrawl.
Q. Yes. Is that a carbon copy of a letter you sent to Mr. Morton J. Luchs?
325 A. Yes, it appears to be.
Q. Did you send that carbon copy to the Washington Real Estate Board?
A. There is a notation on the bottom that a copy was sent, but of course I don't know that it ever was.
Q. You wouldn't have any independent recollection now that you did what is stated on the bottom "cc to Washington Real Estate Board"?
A. No. We send out some two or three million letters a year and I just wouldn't know.
Q. Who was Morton J. Luchs in 1935?
Mr. LEAHY: I object; it is immaterial; too far back; it is outside the statute.
The COURT: I will admit it. He was president of the Washington Board, wasn't he?
The WITNESS: I don't know; I don't remember that.
The COURT: All right; he doesn't know.

By Mr. KRAMER:
Q. Who was Robert R. Otis?
A. Mr. Robert Otis was a realtor, or is a realtor, in Atlanta, Georgia.
Q. Do you know whether or not he ever headed any of the committees of the National Association of Real Estate Boards?
A. Yes, he did.
Q. What committee?
326 A. A committee on Rates, Rules and Customs.
Q. Do you know when that Committee of the National Association of Real Estate Boards was formed?
A. This letter is dated 1935 and I assume the committee was formed in that year. It is a long time ago; I don't remember specifically.
Mr. KRAMER: If the Court please, I move the admission in evidence of Government's Exhibit 30 for Identification.
Mr. WHITEFORD: I object.
Mr. LEAHY: I object.
The COURT: For what purpose?
Mr. KRAMER: For the purpose of showing the purpose of the Committee on Rates, Rules and Customs of the National Association, and for the purpose of showing that

a member of the Washington Real Estate Board was on that committee; and for the purpose of showing that the Washington Real Estate Board was informed that a member of their Board was on the committee.

Mr. LEAHY: There is no evidence he was on the committee; he just said he didn't know.

Mr. KRAMER: I call upon counsel to produce the minutes of the National Association of Real Estate Boards for 1935 which show the membership of the Committee on Rates, Rules and Customs of the National Association in that year. They have them here in court, I believe.

Mr. WHITEFORD: You had them and turned them
327 back yesterday or the day before. You have had them, for the past ten years; or before that time. I assumed you did what you wanted to with them. They are back in my office. I told you you could have them and I sent them down to you, but even if you had them it wouldn't make this admissible.

If Mr. Luchs, who is now dead, and who was a member of the Washington Real Estate Board—I knew him and represented him, I agree, that is true—but that has nothing to do with the admissibility of this letter.

The COURT: I will sustain the objection.

Mr. KRAMER: May I ask on what grounds, your Honor?

The COURT: No, and I don't want you to ask me again either on what grounds I sustain an objection.

How long have you been trying cases?

Mr. KRAMER: I have been in the Department of Justice ten years.

The COURT: I didn't ask you that. I asked you how long you had been trying cases.

Mr. KRAMER: I have been trying cases constantly since I came with the Department.

The COURT: And you ask a judge why he makes a ruling? Is that your practice?

Mr. KRAMER: My practice is to—

The COURT: No; you answer my question. Do you ask judges why they make rulings?

328 Mr. KRAMER: No, no, I don't ask them why they make rulings.

The COURT: Very well, then don't do it again. And don't try to put in evidence of this kind and character—a letter addressed to somebody, now dead, who happened to be a member of the Washington Real Estate Board—if you are going to prove this case I expect you to produce evidence to prove it and not be putting in this type of evidence.

While I am at it, Exhibit 29 will be excluded also.

(Document heretofore marked for identification Government's Exhibit 29 was excluded by the Court.)

Mr. KRAMER: Will you mark this Government's Exhibit 31?

(Report on association activities, January, 1936, marked for identification Government's Exhibit 31.)

By Mr. KRAMER:

Q. Mr. Nelson, I hand you Government's Exhibit 31 for Identification and ask you if that is a copy of the report of the Association's activities made by you in January, 1936?

A. Yes, Mr. Kramer, I believe it to be. I haven't looked at it for many years.

Mr. KRAMER: If the Court please, I move the admission in evidence only of that portion of this exhibit which is on page 6, under the heading "Committee on Rates, Rules and Customs" because I believe that is the only part

329 of this exhibit that is relevant to this case.

The COURT: All right; it may be admitted. That minute shows Robert Otis was Chairman of the Committee on Rates, Rules and Practices, doesn't it?

Mr. KRAMER: Yes, it does.

Mr. WHITEFORD: I assume it is admitted just for the purpose of showing that he was Chairman, and to that extent only, I have no objection.

Mr. KRAMER: I was making the full offer to show whatever is stated in the four lines.

The COURT: That's right:

"In an effort to bring about more uniformity in language, style, and basis of calculation in Realtors' charges, this committee was formed during the year under the chairmanship of Robert R. Otis of Atlanta. This is a long-time effort but one which may yield us important results."

That's all you are putting in?

Mr. KRAMER: Precisely, your Honor, and thank you for reading it.

The COURT: All right.

Mr. KRAMER: Will you mark this Government's Exhibit 32 for Identification?

(Order of business, 1936, marked for Identification Government's Exhibit 32.)

330 The COURT: This Government's Exhibit 32 is an agenda that was gotten out for a meeting of the Board of Directors of the National Association of Real Estate Boards held in 1936, in New Orleans, Louisiana, isn't it?

Mr. KRAMER: That's what I was about to ask the witness.

The COURT: How is that admissible? This is something that is to be done, and was gotten up, I suppose, for the benefit of those who were going to attend the meeting.

Mr. KRAMER: I would like to find out who got it up and then I can answer your question.

The COURT: All right, if the witness knows who got it up. Do you know who got it up, Mr. Nelson?

You mean an individual or the association?

Mr. KRAMER: I believe the association got it up through Mr. Herbert Nelson.

The COURT: Oh, you think Mr. Nelson got it up?

Mr. KRAMER: I was about to ask the witness, yes.

The COURT: All right. Did you get it up?

The WITNESS: Well, sir, these orders of business, which are customary in our meetings, are a compilation which the staff makes. I do some of it and others may bring in other items, and we assemble from various departments or from committees the things that they would like to have the Board of Directors know about or see; and that is what we call our agenda.

331 By Mr. KRAMER:

Q. Do you pass on it?

A. I can't say I personally did all this.

Q. But you are in charge of preparing this?. You are the executive head?

A. That is right.

Q. Of the National Association?

A. That is right.

Q. And you undoubtedly saw that before it was handed to the president at the meeting, did you not?

A. Undoubtedly I did.

Mr. KRAMER: With respect to Government's Exhibit 32 for Identification, your Honor, I move the admission in evidence only of Item 13 on page 5.

The COURT: That is excluded. I can't admit any part of Exhibit 32. The whole exhibit is excluded.

Mr. KRAMER: I understood your Honor to say that.

Mr. WHITEFORD: You say Item 13 on page 5?

The COURT: I have excluded the entire exhibit. Item 13 was the one he specifically referred to, on page 5.

Mr. KRAMER: That was the one I offered.

(Document heretofore marked for Identification Government's Exhibit 32 was offered and excluded by the Court.)

Mr. KRAMER: Mr. Clerk, will you mark this Government's Exhibit 33 for Identification?

332 (Minutes of meeting, Board of Directors, National Association, May 13, 1937, marked for identification Government's Exhibit 33.)

By Mr. KRAMER:

Q. Mr. Nelson, I hand you what purports to be a copy of the minutes of the meeting of the Board of Directors of the National Association of Real Estate Boards, held at the Biltmore Hotel in New York on May 13, 1937, and ask you if those are the minutes of the meeting of the Board at that time?

A. Mr. Kramer, I assume that they are. I haven't seen them for a good many years, and this is the first time I have looked at them for at least ten years, but I assume it is a correct copy if it was taken from our records.

333 Q. Look at the first page of that exhibit and tell us, please, whether that refreshes your recollection that in 1937 Mr. Waverly Taylor of the Washington Real Estate Board was a member of the Board of Directors of the National Association?

Mr. WHITEFORD: If it is important, I concede it.

Mr. KRAMER: Thank you.

The WITNESS: I am quite sure that is correct, yes.

By Mr. KRAMER:

Q. I call your attention to pages 7 and 8 of those minutes and ask you to read to yourself that material under "Report of Committee on Rates, Rules and Customs".

A. Mr. Kramer, I have read the item.

Q. I now hand you Government's Exhibit No. 16 for Identification as to which Mr. Rush testified that he received it and ask you if that is the document referred to in Government's Exhibit for Identification No. 33?

Mr. WHITEFORD: That exhibit you are now handing him is No. 16?

Mr. KRAMER: That is right, the progress report.

The WITNESS: Mr. Kramer, I can only say on all these things that I assume they are correct copies of our records, but I personally do not remember this particular document. I handle a large volume and I just cannot remember all of these things directly but I assume it is a correct copy.

The COURT: What is No. 16, the progress report?

334 Mr. KRAMER: That is right.

The COURT: That has not been admitted?

Mr. KRAMER: No; I have not offered it. Mr. Rush testified that he received it; that it has his name on the top right-hand side of the page.

By Mr. KRAMER:

Q. From reading Government's Exhibit for Identification No. 33, the portion that I have called to your attention, do you have any independent recollection now what happened those eleven years ago?

A. I am afraid I do not, sir.

Mr. KRAMER: If the Court please, I move the admission in evidence of that portion of Government's Exhibit 33 which starts on page 7 and ends at the top of page 8 and is headed, "Report of Committee on Rates, Rules and Customs".

Mr. WHITEFORD: And I object to it, if your Honor please.

Mr. KRAMER: On what ground?

Mr. LEAHY: That matter was tabled.

Mr. WHITEFORD: On most any ground you want. In the first place, it is in 1937. It is only a report and everything that it talks about winds up with it all being tabled. If you turn that into any action to help fix the rates in Washington in 1943, I yield you Houdini's place. Nothing was done about it except talk.

Mr. KRAMER: If the Court please, something was
335 done about it. They sent the report out to the members.

Mr. LEAHY: There is no evidence of that. I move that be stricken from the record, if your Honor please.

Mr. WHITEFORD: That is not according to the record.

Mr. KRAMER: Mr. Rush testified he got this report.

Mr. LEAHY: You try to identify it with Exhibit No. 33. You just tried to do it and could not. Why do you stand in front of the jury and make that statement? Because you don't know what you are talking about.

The COURT: This is a report of the Committee on Rates, Rules and Customs and I don't know whether the matter referred to that "Mr. Catharine moved that the matter be tabled, with thanks to the committee for its work," means the matter of the previous motion of sending out the schedule with the understanding that it had not been approved by the National Association or whether it means that the motion that was carried was sent out so, under those circumstances, I will have to sustain the objection.

Mr. KRAMER: If your Honor please, I feel that, unknowingly, I have misled the Court by failing to tell him

the National Association and the Washington Board have stipulated the authenticity of Government's Exhibit 16.

The Court: That may be true that that is an accurate copy of the minutes of this meeting. I don't doubt that.

Mr. Kramer: Government's Exhibit 16 is the
336 progress report.

The Court: They have agreed that this is an accurate copy of the minutes of the meeting of the Board of Directors of the National Association but if you can tell me what that means, I wish you would. It states at the end that the matter was tabled with thanks to the committee for its work.

Mr. Kramer: If the Court please, in moving the admission of Government's Exhibit 16, the Government's theory is—

The Court: Let's get rid of Exhibit 33 first. Didn't you move the admission of 33?

Mr. Kramer: Yes.

The Court: Let's get through with that first.

Mr. Kramer: Exhibit 33 is the official minutes of this body. It shows the action that was taken at a meeting.

The Court: What action?

Mr. Kramer: I would have to read the minutes.

The Court: No; you just read on page 7 and the top of page 8. It says, "Mr. Catharine moved that the matter be tabled, with thanks to the committee for its work. Motion seconded and carried."

Will you tell me what that means?

Mr. Kramer: What it means?

The Court: Yes.

Mr. Kramer: I am trying to tell the Court that the report was considered and they sent the report to the members.

337 The Court: Show me where that is.

Mr. Kramer: The first paragraph, the second paragraph.

The Court: The third paragraph is the one.

"Mr. Hutchinson moved that this report, eliminating all figures used, be sent to our member boards for their information and study. Motion seconded and carried."

Another motion was made to send out the schedule with the understanding that it had not been approved by the National Association. Motion seconded by Mr. Kemp.

Then Mr. Catharine comes along and moves that the matter be tabled, with thanks to the committee for its work. Motion seconded and carried.

What does that mean?

Mr. KRAMER: I supposed that was for the jury to decide what it means. My purpose was to get in the progress report and show that that was sent to the Washington Board. That is my sole purpose. If that is admitted, I withdraw my offer of 33.

The COURT: You mean if it is conceded that No. 16 was received?

Mr. KRAMER: Was sent to the Washington Board by the National Association of Real Estate Boards' Committee on Rates, Rules and Customs.

The COURT: Any objection to that?

Mr. LEAHY: They haven't been able to prove it.

338 Mr. WHITEFORD: Nobody knows how it came into Mr. Rush's hands. Even if it were true, I still object to it as being in 1936. I agreed here yesterday to a letter that was written by Mr. Barnard enclosing what was called a guide, two copies of which Mr. Rush said he got and that was in 1941 which would seem to have possibly some relevancy to this fine spun theory of Mr. Kramer's. What good is whatever happened in 1936 anyhow if something else happened after that?

Mr. KRAMER: If the Court please, we are trying to show the course of the conspiracy the indictment charges.

Mr. WHITEFORD: What do you mean by "course of conspiracy the indictment charges?" Of course, we had a Committee on Rates, Rules and Customs. Of course if functioned and did something and they talked about it, but what has that got to do with the conspiracy? There must be some relevancy to it. I assume from the way you are trying to prove it, if they had a committee back in 1908 you would try to talk about it.

Mr. KRAMER: I don't know what I would do if they had.

The COURT: I will sustain the objection. Both exhibits are excluded; 16 and 33.

(The documents previously marked Government's Exhibits 16 and 33, and offered in evidence, were excluded by the Court.)

Mr. KRAMER: Will you please mark this Govern-

339 ment's Exhibit for Identification No. 34?

(Program of activities and budget for 1938 of the National Association of Real Estate Boards was marked Government's Exhibit 34 for Identification.)

By Mr. KRAMER:

Q. Mr. Nelson, I hand you Government's Exhibit No. 34 for Identification and ask you to look it over and, after you

have looked it over, tell us whether or not you prepared that or whether it was prepared under your supervision?

A. Mr. Kramer, I think I prepared that or had something to do with it anyway.

Mr. KRAMER: If the Court please, I move the admission in evidence of that portion of Government's Exhibit No. 34 that is on page 8 under the heading of "H, Customs and Charges".

Mr. WHITEFORD: I object.

The COURT: Sustained.

Mr. KRAMER: I didn't hear, your Honor.

The COURT: Sustained.

(The document previously marked Government's Exhibit 34 for Identification, and offered in evidence, was excluded by the Court.)

Mr. KRAMER: Will you mark this Government's Exhibit 35 for Identification, please? It purports to be a report of the executive vice-president in January of 1938.

340 (Report of the executive vice-president of the National Association of Real Estate Boards for January, 1938, was marked Government's Exhibit 35 for Identification.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit No. 35 for Identification and ask you if that is the report you prepared as executive vice-president of the National Association of Real Estate Boards in 1938?

A. Yes, I believe it to be.

Mr. KRAMER: If the Court please, I move the admission in evidence of that portion of the report which appears at the bottom of page 5 and the top of page 6 under the heading of "Report of Committee on Rates, Rules and Customs."

The COURT: There isn't any page 5.

Mr. KRAMER: In the center at the top. It is page 5 of this report. In the center at the top of each page is the page number and they are also pages 11 and 12.

Mr. WHITEFORD: I likewise object to that. It is the same language as in the other.

The COURT: In view of the statement by Mr. Whiteford that the National Association has had a Committee on Rates, Rules and Customs, I will sustain the objection.

(The document previously marked Government's Exhibit 35 for Identification, and offered in evidence, was excluded by the Court.)

341 Mr. KRAMER: Will you mark this for identification, please, Government's Exhibit No. 36?

(Copy of report prepared by executive vice-president, National Association of Real Estate Boards, January, 1939, was marked Government's Exhibit 36 for Identification.)

By Mr. KRAMER:

Q. Mr. Nelson, I hand you Government's Exhibit for Identification No. 36 and ask you if that is a copy of a report which you prepared on behalf of the National Real Estate Board in January, 1939?

A. I believe it to be, yes, sir.

Mr. KRAMER: If the Court please, I offer in evidence that part of Government's Exhibit 36 for Identification that appears on page 7 of the document under the heading, "Committee on Rates, Rules and Customs."

Mr. WHITEFORD: I object to that. It is the same character of thing we have been having for seven or eight years, according to these records.

The COURT: Yes, and it has been conceded by the defense that there was in existence a committee on Rates, Rules and Customs and that they submitted to the various boards a guide on the rates, rules and customs which has also been introduced in evidence.

All this is is a report of the executive vice-president saying who is going to be the new chairman:

342 that he comes from California and stating how much success he has had in California with standard rates recommended by his State Committee.

In view of the fact that the National Association did, in fact, have a guide on rates, rules and customs and standard commissions which were sent to all the boards, including the Washington Board and which is already in evidence, I see no probative value of putting in a report of the executive vice-president in 1939 that they were going to have a new chairman.

(Document previously marked Government's Exhibit 36 for Identification, offered in evidence, was excluded by the Court.)

343 Mr. KRAMER: It is the next sentence, your Honor, the third sentence I have in mind, showing knowledge and state of mind, if you prefer, of the Executive Head of the National Association. He wrote this report, if your Honor please.

The COURT: Certainly he did.

Mr. WHITEFORD: Certainly he is not indicted for his state of mind, I wouldn't think.

The COURT: I will sustain the objection.

Mr. KRAMER: May we approach the Bench a moment, with counsel, please?

(Thereupon counsel approached the Bench and conferred with the Court, out of the hearing of the jury, as follows:)

Mr. KRAMER: Apart from the question of probative weight, would your Honor regard it as inadmissible and erroneous if I were to ask the witness whether a movement for standardizing commission schedules throughout the country was growing rapidly in 1939? Though we hesitate to press the point—

The COURT: That's all I have been hearing for the past two or three days is that because of the confusion that existed in the industry that something ought to be done, and therefore they had studied the matter, and that the National Association had put out a Guide and made certain suggestions and asked for comments by the Local Boards, whether or not they agreed to them or had any other suggestions, or whether or not there were peculiar
344 situations in that neighborhood in which that Board functioned that warranted a different kind of a rate.

And the evidence showed that despite the fact that the National Association submitted the Guide, that no answer was even made by the Washington Board, because in that suggestion the National Association had recommended a 5 per cent up to $100,000, and the Washington Board picks out one at $50,000. How is that an agreement between the Washington Board and the National Board to fix the—

Mr. KRAMER: We charge no agreement.

The COURT: What is a conspiracy?

Mr. KRAMER: It is an understanding.

The COURT: How is that an understanding?

Mr. KRAMER: As our second memorandum says—

The COURT: I read your second memorandum very thoroughly at the noon hour and it is a very magnificent piece of work; I am not questioning that at all; but this is a practical situation and I can't guess a lot of things.

It has been proved that both parties had committees on this question of schedules.

It has been shown that the National Association made suggestions to these various Boards, including the Washington Board, and among those suggestions was that they ought to charge 5 per cent on the first $100,000, as a result of the studies made by their committee.

345 And then they asked for comments on it, whether the Board agreed with them or not; there is evidence to show the Board never answered the letter, but a period of two years went by when the Local Board finally got up a schedule of 5 per cent on the first $50,000.

You are arguing that because of what transpired, merely because the Local Board joined the National Association, because there was a Code of Ethics, and because in the Code of Ethics it says you ought to comply with the rules and we think that the price established by the Local Boards is a reasonable one, and ought to be followed, you contend to me that that is either an agreement or is an understanding?

Mr. KRAMER: No, I don't, your Honor; I am sorry. The trouble with me is I am not being clear.

The COURT: Well, I say you are not.

Mr. KRAMER: Our position is that that statement in the Code of Ethics, coupled with the agreement that each member would be bound by it—

The COURT (interposing): Couple them all up, how can you say that the National Board and the Local Board agreed on this thing, when the Local Board didn't even answer the letter suggesting 5 per cent on $100,000?

Mr. KRAMER: I am trying to show, through these documents as they are coming in, that one of the purposes of the National Association's Committee on Rates was to
346 raise commission rates, or as they suggested to raise them 5 per cent up to $100,000, and the Washington Board adopted them only up to $50,000.

The COURT: And that is a conspiracy?

Mr. KRAMER: Coupled with Article 9, that every member would be bound by it.

Is it your position that is not a *prima facie* case?

The COURT: I don't think it is. I don't think you are going to make this case, Mr. Kramer. You do what you want, but I am telling you from what I have heard already.

Mr. KRAMER: Your Honor will understand, I take it, that even in the event we do not satisfy your Honor that the National Association had the understanding with the local Association, we would still have an independent question to consider.

The COURT: Oh, that's another matter, whether or not the conspiracy with other co-conspirators, that are not named as defendants, existed.

Mr. KRAMER: That is right. You are not foreclosing me from discussing that?

The Court: No, indeed, of course I am not.

This is a practical situation which I think ought to be dealt with and not along a lot of reports of committees, which weren't even followed through and authorized by the Board, and then a schedule put up by the Executive
347 Vice President that we have had this committee and we are making progress and we want to improve the conditions, even if it requires raising the rates, and then attempt to show—that is a serious matter, a conspiracy.

You are alleging that the National Council, or the National Board, and the local Board entered into a conspiracy. That's a pretty definite thing.

Mr. Kramer: No doubt about that.

The Court: It is a very definite thing.

Now, you have produced evidence to show what action the National Board took and the local Board, but there has got to be some coming together somewhere, hasn't there?

Mr. Kramer: I am suggesting to your Honor that the coming together is by the agreement of each member of the Washington Board who is a member of the National Association, to be bound by the Code of Ethics of the National Association.

The Court: And there is another thing I think I ought to throw out to you, too, for future reference.

I am very much concerned on your proof that even conceding everything, how is it a restraint of trade? That is another matter.

Mr. Kramer: That is another matter, and we will be prepared on that at length.

The Court: Keeping in mind the number of real
348 estate brokers—.

Mr. Kramer: This isn't a monopoly case. The Supreme Court has held that you don't have to show any proportion of business, in the Socony case—

The Court: In the fixing of what rate?

Mr. Kramer: The fixing of commission rates.

The Court: Oh, in the Socony case, commission rates, just parallel with this case?

Mr. Kramer: Oh, no.

Mr. Whiteford: It was gasoline and oil.

The Court: That was the purpose of the Sherman Act, to apply to commodities.

Mr. Whiteford: There are two answers to that—

Mr. Kramer: Let's save that for argument; we are not ready for it; I am sorry I opened it up.

The COURT: Surely, you can save it. How many more exhibits have you got?

Mr. KRAMER: Those there (indicating).

Mr. WHITEFORD: They are all alike, your Honor.

The COURT: Are they all the same type? Are these reports of the Executive Vice President?

Mr. WHITEFORD: The same kind.

The COURT: If you put in, and you have practically put it in, what action the Committee on Rules took, and the approval or disapproval of its action by the National
349 Board, that is one thing, but I don't get the significance of merely putting in "The new President is so and so."

Let's take this next one and see what it says—

Mr. KRAMER: We are entitled to show the purpose of the Committee.

Mr. WHITEFORD: Mr. Kramer, let me say this to you, which I haven't so far said: If your contention about this is right, then this was a conspiracy complete the day in 1913 when the Washington Board became a member of the National Association. You must remember this is a nation-wide thing.

If your contention is true, then from the very day that the Washington Board joined and had any common custom as to rates, fees, and charges, then it was in violation of the law.

Mr. KRAMER: That was in 1928.

Mr. WHITEFORD: It was in 1913.

The COURT: Here is what you propose to offer:

"President Ostendorf asked Mr. Paul S. Bomberger, Chairman, to present the report of the Committee. A copy of the tabulations presented by Mr. Bomberger appears on pages 21-25.

"Mr. Reaume stated that he thought the Committee should be highly commended for their work in presenting this fine compilation of rates. He said there is no doubt
350 that this is a good, constructive piece of work, and will enable the directors to go back to their respective boards and suggest adjustment of rates by pointing out that higher rates are being obtained in other cities for the same type of services. Mr. Reaume then moved that a vote of thanks be given Mr. Bomberger and his Committee. Motion seconded and unanimously carried."

Mr. KRAMER: That is an expert expression of my whole contention with respect to the Committee on Rates. It is

our position that that is exactly what happened; that you had a representative of the Washington Board on that Committee.

The COURT: So what?

Mr. KRAMER: And he goes back and makes recommendations, or statements, to the Board, and that is my contention, that the introduction of this document, assuming it gets in evidence, is enough to shift the burden of proof in that instance.

Mr. LEAHY: Proof of what?

Mr. KRAMER: That he did go back.

Mr. LEAHY: Who did go back?

Mr. KRAMER: The member of the Washington Board.

Mr. WHITEFORD: Nobody knows whether he was there.

Mr. KRAMER: He was on the Committee. What do you mean, nobody knows whether he was there?

The COURT: This man says here, "and will enable
351 the directors to go back to their respective Boards and suggest adjustments of rates."

Do you mean to say that the presumption arises that they did go back?

Mr. WHITEFORD: And directors who were not members of this Committee?

Mr. KRAMER: I meant a member of the Committee.

Mr. WHITEFORD: Do you figure any way they moved that boundary line in the District of Columbia under this?

The COURT: It says "directors" in this report.

Mr. KRAMER: Is that what it says?

Mr. WHITEFORD: You read it "directors".

The COURT (reading): "He said there is no doubt but that this is a good, constructive piece of work, and will enable the directors to go back to their respective Boards and suggest adjustment of rates."

Is it your contention that because that is in this minute of the meeting that there is a presumption that they did go back?

Mr. KRAMER: No; because that is in that meeting—

Mr. WHITEFORD: (interposing) And suppose they went everywhere else but to the District of Columbia?

Mr. KRAMER: My position is that the statement is admissible.

The COURT: Are you going to offer Exhibit 37?

352 Mr. KRAMER: Yes.

The COURT: I will exclude it.

(Minutes of meeting of Board of Directors, National Association, May 6, 1939, marked for identification Govern-

ment's Exhibit 37, was offered in evidence and excluded by the Co rt.)

Mr. KRAMER: This would be satisfactory. Let's go through them here and perhaps we can save time.

The COURT: This is a report of the Executive Vice President for 1939. Here is Government's Exhibit No. 38 on the Committee on Rates, Rules and Customs. This is a report of the Executive Vice President, in which he says:

"The local schedules of charges for realtors' services will be studied by this Committee at its first meeting this year to be held in Chicago on May 4th, under the chairmanship of Paul S. Bomberger, of California. A special compilation has been made for the Committee's study of the varying rates in effect in cities over 100,000 population. It is hoped that the work of this Committee will result in a report which will be helpful to member Boards in revising their schedules."

Mr. KRAMER: We have that compilation. I would have offered that as evidence of the background on which the guide was sent out.

The COURT: I will exclude that.

353 (Report of Executive Vice President, May, 1939, marked for identification as Government's Exhibit No. 38, was offered in evidence and excluded by the Court.)

The COURT: Here is another report of the Executive Vice President:

"Chairman Paul Bomberger and his Committee have issued a guide on rates, rules, and customs, to all member boards, and many congratulatory comments have been received. Any suggestions for revisions or improvements in the study will be considered by the Committee at its meeting in Los Angeles. There has been a big demand for help of this kind from a number of boards which are interested in revising their schedule and bringing it up to date in accordance with the latest national thought and practice."

Mr. KRAMER: It is a statement by Mr. Nelson, isn't it, an official representative of the National Association, of the purposes of the Committee?

The COURT: There isn't any question about what the purposes were.

Mr. KRAMER: Oh, yes, they deny their purpose was to raise rates throughout the country.

Mr. WHITEFORD: There are so many answers to that.

The COURT: He doesn't say that in here.

Mr. KRAMER: He did in one of the letters.

354 Mr. WHITEFORD: Did you copy off the letter where it refers to the criticism by the Senator on the Floor of the Senate raising Cain with the War Department because they paid one rate for the purchase of land in one jurisdiction and another rate twice as high in another jurisdiction?

Mr. MALETZ: Are you suggesting the War Department suggested that the Washington Board raise its rates?

Mr. WHITEFORD: No.

Mr. MALETZ: Is that the sum and substance of your suggestion?

Mr. WHITEFORD: They were condemning the real estate fraternity for overcharging; for charging something for one service in one place and defrauding the Government, damning the Realfor wherever he is.

There is one long paragraph in one of those.

Mr. KRAMER: It seems that we should be entitled to prove, and I want to make it clear that my purpose is to attempt to show—

The COURT: You have already put in evidence the action taken by this Committee and approved by the Board of Directors. Why go back of that and put in an expression of the Executive Vice President to the effect that this year w have got another chairman and the Committee is going to meet, and they are going to issue their report, and any suggestions you have, whether you agree or disagree,

355 will be greatly appreciated?

Mr. KRAMER: One reason, and the only reason is because we want to show that one of the purposes was to raise and make uniform rates of commission in the District of Columbia.

Mr. WHITEFORD: Not only wasn't, but didn't do it.

The COURT: I will exclude Exhibit No. 40.

(Report of Executive Vice President, October, 1939, marked for identification Government's Exhibit 40, was offered in evidence and excluded by the Court.)

The COURT: Government's Exhibit 41:

"Paul Bomberger, Chairman. The commission schedule guide prepared by this Committee and accepted by the directors and the delegate body at Los Angeles, has gone out to all member boards, and many of them are taking steps to improve their commission rate schedules. Chairman Bomberger, who will also chairman the committee this year, is anxious to help all boards in revising and bringing their schedules up to date during the coming year."

Is there any question but that the Committee met and they approved it and sent it out? You have already got it in there.

Mr. KRAMER: I will withdraw my offer of this one; that is Government's Exhibit 41.

The COURT: Very well.

356 (Report of Executive Vice President, January, 1940, marked for identification Government's Exhibit No. 41, was withdrawn.)

The COURT: Let's go to the next one, Government's Exhibit 42:

"Committee on Rates, Rules and Customs. Paul S. Bomberger, Chairman. Last year this Committee completed a guide on commission rates which has been issued to all member boards and state associations. The matter of uniform commission rates is now being discussed and studied in an increasing number of boards as a result of the Committee's work. In many cities of the same size and similarly located a wide variance exists in their schedules, and Chairman Bomberger's Committee is seeking to stimulate their correlation."

Mr. KRAMER: The purpose there was to show that the guide was an attempt to get uniform commission rates.

The COURT: Do you want that to go in?

Mr. KRAMER: Yes, I want them all to go in.

The COURT: I can't let them all go in. I don't know whether I should let this one go in.

Mr. WHITEFORD: What does it show? Mr. Kramer, the trouble is you only hear one word in all this, rates, rates, rates! The definition, the basis of the rates, the standards that have to be determined—your can't read those between them.

357 schedules if you looked at them and get any similarity

Mr. LEAHY: The trouble there is it has nothing whatever to do with the District of Columbia.

The COURT: No, this is further evidence against the National Association.

Mr. KRAMER: We have to try to prove the case some way, your Honor. At the end of the case we will argue.

Mr. MALETZ: It is our contention that the Committee on Rates, Rules, and Customs, stimulated the action of the Washington Board.

Mr. LEAHY: How does the recitation of an historical event—

Mr. MALETZ: In order to show that, Mr. Leahy, I think

we are entitled to show what the background of the Committee on Rates, Rules, and Customs, was.

The COURT: It is stipulated that in 1940 H. Clifford Banks, of Washington, D. C., was a member of the Committee on Rates, Rules, and Customs.

Mr. KRAMER: And that he was at the same time a member of the Washington Real Estate Board.

The COURT: Oh, yes, surely. We don't have to worry about that one.

Here is a 1941 committee—

Mr. KRAMER: The same point there.

The COURT: Let's see what this looks like. The
358 same stipulation for 1941.

Here is 1942. The same thing for 1942.

Here is another report of the Executive Vice President:

"The Committee on Rates, Rules and Customs: Boyd T. Barnard, of Philadelphia, who will continue as Chairman during 1942, has endeavored throughout the past year to obtain from as many of the boards as possible information concerning prevailing schedules and contemplated changes, and this information has been assembled and catalogued. As a result of the Committee's activities many boards are making complete studies of their existing schedules with a view toward changing them to conform as nearly as possible with the suggested National Guide. It is interesting to note that the Boards which are changing their schedules are revising upward."

Mr. KRAMER: That, of course, is, we contend, the most important exhibit in the whole pile.

The COURT: This one is?

Mr. KRAMER: That is right. It establishes our point that the purpose of the committee was to raise commission rates.

The COURT: Suppose it was? Is that the crux of the whole case?

Mr. KRAMER: No, it is not the crux of the whole case.

The COURT: Suppose they agreed to make it 3 per cent?

359 Mr. KRAMER: It still would have been unlawful.

Mr. WHITEFORD: It would have been just as much a violation but you wouldn't have been here.

The COURT: I will admit Government's Exhibit No. 43 for whatever it is worth.

Mr. WHITEFORD: I object to it on every ground there is.

(Report of the Executive Vice President, January, 1942, marked and received in evidence as Government's Exhibit No. 43.)

The Court: Tell me what this one is.

Mr. Kramer: I will withdraw the offer of this one at this time, your Honor.

Mr. Whiteford: What one does that talk about?

The Court: That is Exhibit 44; withdrawn.

Mr. Whiteford: For the year 1944?

The Court: No, Exhibit 44.

(Document marked for identification, Government's Exhibit No. 44, was withdrawn.)

The Court: Mr. Kramer, there are three lines in that one.

Mr. Kramer: I will withdraw this for the time being. I will offer it with Mr. Barnard.

The Court: Government's Exhibit No. 45 is withdrawn.

(Report of Executive Vice-President, May, 1942, marked Government's Exhibit No. 45, was withdrawn.)

360 The Court: These are the minutes of a meeting of the Board of Directors of the National Association, Drake Hotel, Chicago, Illinois, on May 22, 1942. There is a line and a half there.

Mr. Kramer: I was not going to offer this in evidence. I was going to ask for counsel to produce the revised chart.

The Court: They want the revised chart.

42 is excluded. The rest are withdrawn and there was one admitted.

He wants the revised chart.

Mr. Whiteford: That would be in May, 1942?

The Court: Is Mr. Barnard here as a witness?

Mr. Kramer: Yes.

The Court: You can ask him.

Mr. Leahy: He has withdrawn that?

The Court: Yes, but he is going to ask about the revised chart.

Mr. Kramer: If you have it, I want you to produce it.

Mr. Whiteford: If there ever was one, it is in Chicago.

Mr. Leahy: Of course, these are all admitted under the general objection that we are not bound by them.

The Court: These exhibits have to do with action, if you can call it action, by the National Council.

Mr. Kramer: Whether or not they spell out a conspiracy will be argued at the end of the case.

361 Mr. Leahy: Yes; but this is under our general objection.

The Court: I excluded most of them. I only admitted one.

Mr. Kramer: I want to raise one other point at this time. The Government's position is that we would like an opportunity at the appropriate time to be heard that evidence of adherence—I am now speaking only in the case against the Washington Board.

The Court: Evidence of what?

Mr. Kramer: Of adherence to the rates is inadmissible if you have shown an agreement on rates has been made; in other words, is admissible only to show there was no agreement. It is the Government's position that the Supreme Court has held flatly in Socony-Vacuum and Trenton Pottery cases that once the agreement is shown, evidence on adherence is irrelevant and I have the precise question here.

The Court: You take it from the viewpoint, first, there must be an agreement between the National Board—

Mr. Maletz: Only the Washington Board.

Mr. Kramer: I am not raising this with respect to the National. I am speaking now only with respect to the Government's case. Your Honor will make that statement, if you are going to, at the end of the Government's case. I am saying that once an agreement on rates is shown evidence of adherence—

362 The Court: I understand what you mean. The fact the agreement was made is sufficient. That is a point of law to be argued later, isn't it?

Mr. Kramer: Yes. The point I am making is—it may be unorthodox at this time—if your Honor has inclinations under way, I should get under subpoena every member of the Washington Board and bring them in here and prove adherence. We can prove that, but I think it is unnecessary.

The Court: Let's reach that at the time and if it is necessary, I will give you time. I don't think it will have to be necessary for you to subpoena the entire membership of the Washington Board.

Mr. Kramer: Thank you.

(Thereupon, counsel resumed their places at the counsel table, and the following proceedings were had in the hearing of the jury:)

Mr. Kramer: What was the number of the exhibit which was admitted?

The Court: I think the one that was admitted, Mr. Kramer, was taken by the other reporter to be put in the record. If you will bring me your copy, I can tell you the one I admitted.

Mr. KRAMER: Yes, I believe I have the one, your Honor.

Mr. WHITEFORD: What is the date?

The COURT: January, 1942? Yes, that is the one I
363 admitted. The others were either withdrawn or excluded.

Mr. KRAMER: That is the report of the Executive Vice-President, January, 1942.

You stipulate the authenticity of this?

Mr. WHITEFORD: Yes.

The COURT: What is the number?

Mr. KRAMER: That is 43. I understood, if the Court please, that the report of the Executive Vive-President for January, 1942, a copy of which is admitted in evidence, that the authenticity of that document has been stipulated by counsel for the National Association.

The COURT: That is correct.

Mr. KRAMER: I only offer that portion, other than the title, which is on page 7 headed, "Committee on Rates, Rules and Customs.

"Boyd T. Barnard of Philadelphia, who will continue as chairman during 1942, has endeavored throughout the past year to obtain from as many of the boards as possible information concerning prevailing schedules and contemplated changes, and this information has been assembled and catalogued. As a result of the committee's activities many boards are making complete studies of their existing schedules with a view toward changing them to conform as nearly as possible with the suggested National Guide.
364 It is interesting to note that the Boards which are changing their schedules are revising upwards."

Will you mark this Government's Exhibit 46 and Government's Exhibit 47 for Identification?

(Summary of findings of real estate brokerage commission rates of local boards was marked Government's Exhibit 46 for Identification.)

(Sales commission on business properties in cities of 100,000 to 300,000 population was marked Government's Exhibit 47 for Identification.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit No. 46 for Identification and ask you to look at it and tell me whether you know who prepared it?

The COURT: What is that exhibit?

Mr. KRAMER: It is titled "Summary of findings of real estate brokerage commission rates of local boards."

By Mr. KRAMER:

Q. My question, Mr. Nelson, was do you know who prepared that?

A. No, I do not, Mr. Kramer. I have never seen it before.

Q. What is your answer to the same question as to Government's Exhibit for Identification No. 47?

A. No, sir, I don't know who prepared that and I have never seen it before.

365 Mr. KRAMER: Will you mark this Government's Exhibit No. 48 for Identification?

(Letter to A. R. Saunders from Herbert U. Nelson, dated February 27, 1946, was marked Government's Exhibit 48 for identification.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit 48 for Identification and ask you if that is your signature appearing at the bottom of that page?

A. No; that is not my signature but I think it is a facsimile that someone in the office made.

Q. You dictated the letter?

A. I am pretty sure I did, yes, sir.

Q. Is that your handwriting at the top of the letter?

A. No, it is not.

Q. I notice this letter is addressed to Mr. A. R. Saunders, Lansing, Michigan. Who was he on February 27, 1946?

A. He was secretary of the Michigan Association of Real Estate Boards.

Q. Do you recall now whether, in 1946, he was a member of the Committee on Rates, Rules and Customs of the National Association?

A. Mr. Kramer, I don't think the committee functioned or that it ever was organized fully in 1946, as I remember it.

366 Q. I hand you Government's Exhibit 48 for Identification and I want to know now, please, whether or not you made this statement in the first sentence of that letter?

A. No; it is all right.

Q. You read, did you, that he was appointed?

A. Yes; and we did not follow through, that was all.

Q. Who was Mr. Boyd T. Barnard in 1946? That is to say, what position did he hold with the National Association of Real Estate Boards?

A. I think that was the year he was president.

Mr. KRAMER: If the Court please, I move the admission in evidence of Government's Exhibit No. 48.

Mr. WHITEFORD: I object.

The COURT: This is a letter from the Executive Vice-President to a Mr. Saunders in Lansing, Michigan. This witness has testified that Mr. Barnard was the president and that all this letter was was to notify Mr. Saunders of appointment as a member of the committee.

Mr. KRAMER: I want to make it clear, so I won't mislead either Court or Counsel, that I am not offering it for that purpose. I am offering it for the last sentence in the next to the last full paragraph which the Government maintains is a perfect expression of its case here against the National Association in so far as it relates to the Committee on Rates, Rules and Customs.

367 The COURT: Which paragraph?

MR. KRAMER: The next to the last paragraph, the last sentence. It was in that letter, if your Honor please, that our theory of this case against the National, in so far as it relates to the Committee on Rates, Rules and Customs, was developed.

Mr. WHITEFORD: Well, that is interesting. I wondered where you got it and you evidently got it from some man who signed Mr. Nelson's signature to a letter written by somebody; nobody yet knows who, who says what his views are in writing to a man who, up to that time, was not an officer, not a member of the committee or anything, telling him he is appointed on a committee for 1946, a committee which never functioned. That is just about as ephemeral as the theory that you have got in this case, as I see it.

Mr. KRAMER: As to the authenticity, I should clear that up. I want to make sure it is authentic. I disagree with everything else you have said.

We are back to the point we were discussing this noon that this is the type of evidence the Government claims can go in as the statement of the Executive Vice-President of an organization—

The COURT: Did you write this letter?

Mr. KRAMER: He did not sign his name to it. He said he dictated it.

368 Mr. WHITEFORD: I didn't think he even said he had written it. That is only one ground of objection. I have other grounds of objection if your Honor cares to hear them.

You notice it is long after the fact, so-called—

Mr. KRAMER (interposing): What difference does that make?

Mr. WHITEFORD: You have got to remember that the thing you are charging is a price fixing arrangement, so-called, that eliminates all competition in the District of Columbia and you say that it happened in February, 1943, and again, because the local board amended its rules, in 1944. Here is something that Mr. Nelson writes to somebody in 1946, if Mr. Nelson wrote it. I don't know. He hasn't said yet that he wrote it.

What difference does it make what he says the opinion of the Committee was or the Committee members was at any time? The question is always "What did they do?" We come back to the occasion right here, "What did they do in the District of Columbia? What did the National do?" Not what a lot of people said. They might as well have called them Communists or Republicans or Democrats or anything else. It wouldn't make a bit of difference.

The question is, "Did they do something that changed that boundary line in February, 1943," that Mr. Kramer has been talking about or that lowered the commission, if you please, beyond that boundary line. That is the vice
369 of what he is talking about.

Mr. KRAMER: May I suggest that Your Honor not rule at this time and we be given an opportunity to consolidate our position with respect to this exhibit which we frankly admit is very important to our case and we recess and submit our memorandum to you in the morning?

The COURT: You are not going to work again tonight, are you?

Mr. KRAMER: Yes, sir, I am.

The COURT: All right.

Mr. KRAMER: I am very anxious that we do the best we can to make our position clear. Once I have done that, I have done all I can do.

The COURT: You must remember that this is a letter that Mr. Nelson said he dictated so I assume that is your letter, is that correct?

The WITNESS: I believe it to be, yes.

The COURT: He says if all the boards can act together—and this is a letter addressed to a board member in Lansing, Michigan—it will prove now an act was committed in concert with the local board in the District of Columbia. I will withhold my ruling until tomorrow morning.

Mr. KRAMER: Thank you, your Honor, because we would like to submit the considered form.

The COURT: Is that all with this witness?

370 Mr. KRAMER: No. That is all I have pending on the admissibility of that exhibit. The other questions relate to what he said in the letter.

The COURT: I am withholding my ruling. Are you through with this witness except when the Court rules on the admissibility of this exhibit?

Mr. KRAMER: I have other questions but at the moment I don't know of any other exhibits. Do you want me to proceed?

The COURT: If you have other questions, you may go ahead.

Mr. KRAMER: So far as the Government's direct examination is concerned, it will take only five or ten minutes more.

The COURT: If you can finish within that time, I will let you finish.

By Mr. KRAMER:

Q. Do you now remember, Mr. Nelson, what the purpose of the Committee on Rates, Rules and Customs of the National Association of Real Estate Boards was? Do you now remember what the purpose was in forming it in 1935?

A. Yes. We were trying to clear up a great many abuses in the business—

Mr. WHITEFORD: Are you going into that?

The COURT: I will let him answer why the committee was formed.

Mr. KRAMER: What the purposes of it were.

372 The COURT: If he knows.

Mr. WHITEFORD: All right.

The WITNESS: I think one of the purposes of forming the committee was to have the committee itself confer with one another and try to establish what their objective ought to be. I mean I don't issue charts to a committee in which I try to instruct the committee as to what it ought to do. The general idea was to clear up some of the abuses that were in existence at that time; that we thought were detrimental to our business, our calling and to the public.

By Mr. KRAMER:

Q. Do you know now, Mr. Nelson, whether the purposes of the Committee on Rates, Rules and Customs, as you conceived them in 1935, ever changed throughout its entire history?

A. Mr. Kramer, I didn't conceive the purposes of the committee. The committee made its own investigations and

outlined its own purposes. That was one of the objectives of appointing the committee.

Q. By "you", I meant the National Association, your association.

A. I can't speak for the National Association, sir.

Q. You can't speak for the National Association?

A. Not as to its objectives and purposes. I am the paid business administrator.

Q. You say you are the paid business administra-
373 tor. How much are you paid?

Mr. WHITEFORD: I object.

The COURT: I don't think that is relevant. He said he was paid.

Mr. WHITEFORD: It is just as relevant as to ask what you get from the Department of Justice.

Mr. KRAMER: That is a matter of public record and I will state it is $8,200 a year.

Mr. WHITEFORD: I might make a comment about that but it would not be polite.

The COURT: Address any objection to the Court and we will have no colloquy between counsel.

By Mr. KRAMER:

Q. Do you deny or affirm that one of the objectives of the Committee on Rates, Rules and Customs was to raise the commission rates charged by brokers generally throughout the country?

Mr. WHITEFORD: We object to that. This applies to the District of Columbia.

Mr. KRAMER: Including the District of Columbia.

The COURT: I think your question ought to be as to what the action of the defendant, the National Board, was as to the crime alleged to have been committed in the District of Columbia. What they did somewhere else is of no moment, is it?

Mr. WHITEFORD: It may not be a crime there.

374 Mr. KRAMER: Unless it helps to show what they had in mind doing here.

The COURT: Ask him that; what they had in mind doing here.

By Mr. KRAMER:

Q. Did you have in mind, in forming the Committee on Rates, Rules and Customs, that it would serve the purpose of raising brokerage commission rates in the United States and specifically including the District of Columbia?

Mr. WHITEFORD: I object.

The Court: Sustained. You can ask him about what the purpose was in the formation of this committee in so far as it affected the District of Columbia which is alleged to be the venue of the crime in the instant case.

Mr. Kramer: That is correct, Your Honor.

By Mr. Kramer:

Q. Will you state, please, Mr. Nelson, whether or not your Committee on Rates, Rules and Customs has as one of its purposes that of achieving uniformity in commission rates as between each of the member boards in the National Association, including the member board here called the Washington Real Estate Board?

Mr. Whiteford: I object again. It is the same question.

Mr. Kramer: Just a moment. The indictment charges, if your Honor please, and so far there has been no suggestion there is anything wrong with the charge, that the purpose of the National Association's Committee on Rates, Rules and Customs was to raise and make uniform the brokerage commission rates prevailing throughout the United States, including the District of Columbia.

The Court: I think that you ought to confine your question to what happened in the District of Columbia. I am not going to decide what happened in Michigan or California or other places.

Mr. Kramer: If the Court please, we don't claim anything happened.

The Court: Can't you ask him what the purpose of the committee was, one, to make uniform rates in the District of Columbia, or two, raise the rates in the District of Columbia without going into the purposes of the committee in the other States?

Mr. Kramer: I am trying to find out whether or not the statement made in the indictment, Paragraph 12, is true. Do you object—do you deny my putting it in that form?

The Court: I am not making the objections.

By Mr. Kramer:

Q. Was one of the purposes of the Committee on Rates, Rules and Customs to raise broker commission rates and achieve uniformity in said rates throughout the United States, including the District of Columbia?

Mr. Whiteford: I object.

The Court: Sustained.

By Mr. KRAMER:

Q. Mr. Nelson, who was it that the Committee on Rates, Rules and Customs of the National Association was not functioning in 1946?

Mr. WHITEFORD: I object to that.

Mr. KRAMER: If your Honor please, I would like to make a showing as to why we want to show that.

Mr. WHITEFORD: He wasn't on it.

Mr. KRAMER: He is Executive Vice-President and head of the organization. How can we prove what an organization did except through a man who talks?

Mr. WHITEFORD: Ask the man you had down here and you let him go this afternoon. You had him here this morning. Mr. Sheehan is the man whose name appeared here and who was chairman of the committee in 1946. That has been put in evidence. Now you ask this witness why it didn't function in 1946.

Mr. KRAMER: He testified it didn't function in 1946, didn't he?

Mr. WHITEFORD: You ought to have asked Mr. Sheehan.

The COURT: Do you know of your own knowledge why the committee didn't function?

The WITNESS: Well, I think I can answer yes, that
377 it was wartime or right after the war, wasn't it—1946—

Mr. WHITEFORD: I object to the witness giving an opinion.

The COURT: I will exclude it unless he knows of his own knowledge why the committee did not function.

You don't know of your own knowledge why the Committee did not function? If you don't do not answer.

The WITNESS: I don't know why the Committee did not function.

By Mr. KRAMER:

Q. Who told you that the committee did not function?

The COURT: Of course, that is the rankest kind of hearsay if you are going to put in who told you something. Do you doubt that it did function?

Mr. KRAMER: I know that it did not.

The COURT: If you know it did not, why are you asking him who told him it did not?

Mr. KRAMER: I was attempting to show, if your Honor please, that the witness, when asked the question—I will withdraw the question, your Honor.

If the Court please, I ask to have marked for identification Government's Exhibit 49. That is the letter to Mr.

Lon Forbush for the information of Mr. Nathan William McChesney, Counsel for the National Association of Real Estate Boards, dated June 26, 1946.

378 (Letter to Mr. Lon Forbush from Nathan William McChesney, dated June 26, 1946, was marked Government's Exhibit 49 for Identification.)

379 The COURT: You are not attempting to introduce this, are you?

Mr. KRAMER: I am going to attempt to show that Mr. Nelson was informed of it and I would like to show why I think that is admissible.

I will submit a memorandum on that, too, if I may, if the Court please.

Mr. WHITEFORD: I hope you submit more than a memorandum.

The COURT: I supposed what you were trying to do was to say that they didn't function in 1946 because of an inquiry made by the Department of Justice.

Mr. KRAMER: No, your Honor.

The COURT: What is it?

Mr. KRAMER: I am trying to show that they didn't function because of what their counsel told them.

The COURT: Well, their counsel told them that.

Mr. WHITEFORD: Again, what difference does it make?

Mr. KRAMER: The letter tells you that, your Honor.

Mr. WHITEFORD: Suppose the counsel had told them about anything, go ahead and function, and they committed a crime under his advice, you wouldn't even let counsel's instructions be offered in evidence, would you?

Mr. KRAMER: Of course I would.

Mr. WHITEFORD: Of course you wouldn't.

Mr. KRAMER: I say the Supreme Court in the

380 American Tobacco case in 1911, and in every case since that time, has stated that evidence of consciousness of guilt is admissible, and I say that is that exhibit.

Mr. WHITEFORD: Well, I have been unconscious for a long time.

The COURT: Your contention is that because their counsel advised them to do something, that was the result of an inquiry made by the Department of Justice, is that correct?

Mr. KRAMER: I don't know what it was the result of, your Honor. I have never spoken to the man who wrote that letter in my life, so far as I know.

The COURT: Well, I will exclude it.

Mr. KRAMER: I haven't offered it yet.

The COURT: Well, I will exclude it.

Mr. WHITEFORD: It was written to a man in Seattle.

Mr. KRAMER: Do you have any objection if I question the witness regarding the letter, without divulging its contents?

The COURT: I will let you ask the question and I will rule on its admissibility after you ask it.

By Mr. KRAMER:

Q. I hand you Government's Exhibit for identification No. 49, and ask you if you remember receiving a copy of that letter, of which that is a photostat?

Mr. WHITEFORD: Is that this same letter?

381 The COURT: Yes.

A. Mr. Kramer, I have never seen this letter, either an original or a copy. The first time I ever heard of this letter was when our own counsel read it out loud in his office here a day or two ago. I can't identify the letter as such.

Mr. KRAMER: If the Court please, in view of the surprise that the witness is indicating when confronted with a letter that bears his name, I think the letter was probably shown to another officer of the National Association, who is present in the court room, and whom we have already excused.

So therefore I would like to ask permission of the Court, either tomorrow morning or tonight, as the Court sees fit, to put him on the stand and question him concerning the reason why the Committee on Rates and Rules—

The COURT: You mean Mr. Sheehan?

Mr. KRAMER: No, I mean Mr. Baker.

The COURT: You may put any witness on you wish.

Mr. KRAMER: We already had him on. I want the privilege of recalling him.

The COURT: Are you through with this witness?

Mr. KRAMER: Until your Honor rules on the letter he wrote to Mr. Saunders, yes, and I just wanted to make sure that we want Mr. Baker to remain until we call him.

The COURT: Where is Mr. Baker?

Mr. BAKER: Here.

382 The COURT: I understand you have made arrangements to leave the city at 4:30?

Mr. BAKER: That is correct.

The COURT: How long will it take?

Mr. KRAMER: Five or ten minutes.

The Court: I will give you five minutes.

(Witness excused.)

The Court: Come back to the stand, Mr. Baker.

Thereupon,

Lowell Baker resumed the stand and testified further as follows:

Direct Examination.

By Mr. Kramer:

Q. Mr. Baker, do you remember in 1946 calling to the attention of Mr. Nelson the opinion of your general counsel that the Committee on Rates—

Mr. Leahy: I object.

The Court: I will sustain the objection.

Mr. Kramer: On what ground, if your Honor please? Excuse me for asking again—

The Court: I will tell you the ground. I am sustaining the objection because I have excluded the exhibit.

Mr. Kramer: That doesn't help me, because I didn't ask you why you excluded the exhibit.

The Court: I have excluded the exhibit, Mr. 383 Kramer, because it is very evident from reading it that the General Counsel wrote out to Seattle, Washington, because of an inquiry made by the Department of Justice, and these defendants are not convicted until they have been convicted by a jury.

Mr. Kramer: That is right.

The Court: And because somebody in the Antitrust Division might be of the opinion that they are doing something that is illegal doesn't make it so.

Mr. Kramer: It certainly doesn't, your Honor.

The Court: So for that reason the letter is excluded.

Mr. Kramer: That is all, Mr. Baker. You may go at 4:30 to Chicago.

(Witness excused.)

(Thereupon, at 3:45 o'clock p.m., an adjournment was taken until Wednesday, May 26, 1948, at 10:00 o'clock a. m.)

384 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950-47

UNITED STATES OF AMERICA
PLAINTIFF

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and
WASHINGTON REAL ESTATE BOARD
DEFENDANTS

Washington, D. C.
Thursday, May 27, 1948

The above-entitled action came on for further trial before the Honorable EDWARD M. CURRAN, Associate Justice, and a Jury at 10 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor H. Kramer, Trial Attorney.
Joseph P. Kelly, Jr.,
Herbert N. Maletz,
C. Heyward Belser,
Attorneys, Department of Justice.

385 On behalf of the National Association of Real Estate Boards:
Roger J. Whiteford,
John J. Wilson,
Jo V. Morgan, Jr.

On behalf of the Washington Real Estate Board:
William E. Leahy,
William J. Hughes, Jr.

387 *Colloquy*

Mr. KRAMER: May it please the Court, I have filed with the Clerk a copy of the memorandum of which I spoke yesterday, and I have handed copies to counsel, and I was wondering how your Honor would feel if we requested an opportunity to be heard orally for some few minutes on the matter and whether or not the jury would be excused.

The COURT: Do you wish to be heard orally?

Mr. KRAMER: Yes.

The COURT: Very well. Excuse the jury.

(Thereupon, the jury retired to their jury room.)

Mr. KRAMER: If the Court please, the question before us is on the admissibility of Exhibit 48, a letter from Her-

bert U. Nelson, dictated but not signed by him, to Mr. A. R. Saunders, of Lansing, Michigan. I would like to start with a few preliminary observations.

An exhibit or any evidence is of course admissible when the author of the document is on the stand unless it is subject to some objection that counsel may have.

We must also bear in mind that in conspiracy cases the Supreme Court has said, in Williamson vs. United States that:

" * * * great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the
388 surrounding facts and circumstances the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth."

With that as the background I come to consider possible objections to this exhibit. The only objection that I know that counsel will not make, as he made when the trial, opened is the objection that it is without the period of the statute of limitations, because of course this exhibit is dated February 27, 1946.

389 We say, if the Court please, that this letter is material because it shows the state of mind of the leading executive officer of the National Association of Real Estate Boards, with respect to a matter concerning which the Government's evidence is directed. We must not think of Mr. Nelson as a mere employee. Government's Exhibit 7, the constitution of the National Association, says:

"He shall be the chief administrative officer of the Association, subject to the president, and the head of the staff charged with its selection, except the directors of the three departments provided for in Sec. 13, subject to the approval of the executive committee. He shall have supervision of the entire staff and shall perform such other duties as may be delegated to him by the board of directors, the executive committee or the president."

As evidence of the importance of Mr. Nelson, your Honor will doubtless recall that on page 30 of the transcript of the first day, Mr. Leahy rose and said:

"If your Honor please, the president of the Washington Real Estate Board is Mr. McConihe. As representing the Board, may he stay in the courtroom? I don't know that we will use him as a witness but I want to make that known to the Court.

"The Court: Yes, he may stay.

390 "Mr. Whiteford: I would make the same request with regard to Herbert U. Nelson, executive vice-president of the National Association."

He said that only to show that counsel selected Mr. Nelson as being the representative of the National Association whom he wanted present in the courtroom to represent the Association during this trial.

The conspiracy with which the defendants are charged is a continuing conspiracy. The indictment charges, in Paragraph 9:

"For many years up to and including the date of the return of this indictment"—

which was on August 27, 1947—

"the defendants and their co-conspirators have been engaged in a combination and conspiracy to restrain the trade and commerce of the District of Columbia."

The indictment, it is true, does not indicate on what date the conspiracy began. It does charge, however, that it had been carried out by various means. It gives several dates. For example, in Paragraph 12 it is stated:

"For many years prior to January 1, 1947, the National Association had a Committee on Rates, Rules and Customs."

In Paragraph 19, it charges that the Washington Board on February 16, 1943, raised its rates pursuant to

391 recommendations received from the National Association.

Paragraph 14, 15 and 16 state that agreements were made by each member as a condition of membership in the National Association and the Washington Board. Inferentially, it gives the date and time at which the co-conspirators respectively joined the conspiracy.

The Government does not claim, of course, that the conspiracy was complete on February 16, 1943. If it did, this evidence at best would be admissible only as possibly referring to the intent of the defendants on that date.

We must also remember that under the Sherman Act the offense is that of conspiring and the Supreme Court has held flatly in *Nash vs. United States* and affirmed again in

the *Socony-Vacuum* case, that the only overt act required is the act of conspiring. We did not charge or, if we did, we don't intend to prove, unless your Honor says it is relevant, any act other than the act of conspiring. Anything we have introduced in evidence that shows that is only for the purpose of tending to prove what the defendants did.

You must also remember that the conspiracy charged is not one—and I want to make this perfectly clear even if your Honor believes this is talking us out of court, we just might as well have it clear now—the conspiracy charged is not one that the rates were established by the National Association. We do not charge that. They didn't
392 establish any rates in the Washington area. So far as we know, they had no legal authority over the Washington Board to dictate to it or to command it, to charge any rates whatever. We charge that the Washington Board entered into an understanding to do what the National Association suggested to it to do.

We charge, secondly, that the extracting of a promise from each member of the National Association in the District as a condition of membership in the National Association that he should charge a certain rate, and while we say the evidence proves more, I am willing on this argument to base it on "should", and as to rates,—whether the Socony-Vacuum case applies with services, which we will meet at the appropriate time,—we say that the action of the Committee on Rates, Rules and Customs, in distributing to its member boards a guide on rates with the purpose in distributing it, which we maintain that Exhibit 48 tends to disclose, is evidence—no more, your Honor—evidence of the conspiracy charged in the indictment.

The COURT: You say that you don't claim that the defendants have agreed upon fixed rates of commission to be charged by the members of the defending corporation in the District of Columbia?

Mr. KRAMER: No, I don't say that. I say we do not say that an element of this conspiracy was that the National Association should decide what rates it wanted
393 charged in Washington and tell the Washington Board or its members, "You charge those rates if they are not your rates." We make no claim that the National Association had the power to come in and dictate rates. We say it suggested them, urged them; urged the adoption of uniform standards, as this letter itself says which the Government has offered.

394 The COURT: You say that the National Association made a suggestion?

Mr. KRAMER: We say that the Committee on Rates, Rules and Customs—

The COURT: Made a suggestion?

Mr. KRAMER: Was formed for the purpose of suggesting to each of the member boards, including this Board.

The COURT: No; my question is, you say that the National Association made a suggestion to the Local Board?

Mr. KRAMER: That's right, to all Local Boards, including this one.

The COURT: Is that a conspiracy, to make a suggestion?

Mr. KRAMER: I say if the suggestion is made with the recommendation that it be acted upon, and it is followed by action, even though it may not be the precise action suggested, coupled with the promise to the National of each member that he should charge whatever rates the Washington Board fixed, is, if we prove it, a violation of Section 3 of the Sherman Act.

But I have gotten off the point, your Honor,—

The COURT: Let's stay off the point. It is very important.

Mr. KRAMER: All right.

The COURT: If you are going to prove this conspiracy you have to prove an agreement between the co-conspirators.

395 Mr. KRAMER: I prefer the word "understanding," because the word "agreement" gives the impression that there was a contract.

The COURT: All right, an understanding; and the understanding is that the National Board and the Local Board agree to have the rates of commission in the District of Columbia fixed at 5 per cent on the first $50,000, is that right?

Mr. KRAMER: That was the end result of the conspiracy.

The COURT: What was the understanding?

Mr. KRAMER: The understanding is that the members of the National Association, who are members of the Washington Board, agreed—that is part of the agreement—agreed with the National Board that they would charge whatever rate the Washington Board established. The Washington Board agreed with the National Association that it would see to it that each member of the Washington Board made that agreement when he became a member of both Associations.

And, secondly, that having made such an agreement as a condition of membership, that the National Association

would attempt to standardize and make uniform and consistent not identical, the rates are not identical throughout the country; we make no such charge—make uniform and consistent, including the District of Columbia, that schedule of charges appearing in the Washington Board without, as Mr. Nelson says in Exhibit 48, suggesting the actual
396 amount of the charge.

The COURT: What do you mean when you use the term "fix the rates"?

Mr. KRAMER: Agreed upon the rates. The prices are fixed when they are agreed upon.

The COURT: And it agreed here to 5 per cent on the first $50,000?

Mr. KRAMER: That is correct.

The COURT: Do you say that the National Board and the Local Board fixed and agreed upon the rate in the District of Columbia?

Mr. KRAMER: Yes, your Honor. That is the charge in the indictment. I don't mean to confine it to that—

The COURT: A few minutes ago you said just the opposite.

Mr. KRAMER: No, if your Honor please. I believe that what I said—I do not mean to contradict your Honor—but I believe what I said was that the members of the Washington Board agreed with the National Association to adhere to and to charge whatever rates of commission were established by the Washington Board.

In other words, the agreement with the National Association was a policing agreement. I am speaking now of Article 9 of the Code of Ethics of the National, coupled with the signed applications for membership made
397 by each member when he came up for membership in the Washington Board. And I say when he did that, when he entered into that agreement, he didn't stop there, although we contend that would be enough.

We say they got together and said these rates throughout the country are topsy-turvy, people get confused—

The COURT: I thought the crux of your case was that these defendants entered into a conspiracy to fix the commission rate on real estate in the District of Columbia.

Mr. KRAMER: That is correct, your Honor.

The COURT: Now, did the National Association agree with the Local Board that the rate of commission on real estate in the District of Columbia should be 5 per cent on the first $50,000?

Mr. KRAMER: No; it agreed with the membership of the National Association that they would charge those rates.

The COURT: What?

Mr. KRAMER: Five per cent on the first $50,000.

The COURT: The National Board did?

Mr. KRAMER: The members of the Washington Board agreed with the National Board on that, that is correct, your Honor, through Article 9 of the Code of Ethics.

The COURT: What did the National Board do?

Mr. KRAMER: It entered into this agreement with each of its members in Washington.

398 The COURT: You say the members of the Washington Board automatically become members of the National Board on a recommendation of the Local Board?

Mr. KRAMER: Yes, upon admission to active membership in the Local Board.

The COURT: Now, you say that the members of the Local Board agreed with the National Board. Now, I want to know what the National Board agreed to. They have to agree to something, don't they? You say the National Board suggested—

Mr. KRAMER: Oh, I see what you mean. Excuse me, your Honor. I think I see your point.

I suppose the consideration for the agreement of each member that he should observe the schedule of commissions—

The COURT (interposing): You say the conspiracy charged is not one to charge rates established or determined by the National Board.

Mr. KRAMER: By the National Board, that's right.

The COURT: The determination of the specific rates was to be made by the Washington Board?

Mr. KRAMER: That is correct.

The COURT: Was it made by the Washington Board alone or was it made by an agreement with the Washington Board and the National Board?

399 Mr. KRAMER: It was made by the Washington Board, if the Court please, after hearing the recommendations of the National Association as to what the rate should be.

Now, if that is all we had I would be out, but we have got more than that, if your Honor please.

We have got this agreement of each member of the Washington Board with the National Association that he should observe the schedule of commissions established by the Washington Board, coupled with the agreement of the Washington Board that it shall enforce this Code of Ethics

and that any member board that does not enforce it may be—not shall be but may be—expelled.

The COURT: That's what the members of the Washington Board agreed to do: Right?

Mr. KRAMER: Yes, your Honor.

The COURT: What did the National Board agree to do?

Mr. KRAMER: The National Board I suppose agreed that in exchange for making this promise each member of the Washington Board should use the term "Realtor".

The COURT: Is a recommendation made by the National Board to the Local Board, that the rates ought to be changed, a conspiracy or an agreement?

Mr. KRAMER: No, it is certainly not an agreement, that is clear, and so far as I can see at the moment it is not, standing alone, a conspiracy. Otherwise you would be destroying the right given in the First Amendment of the Constitution to the right of free speech. I make no such claim.

400 In your Honor's opinion that is the strongest case that you have seen, but I don't want to mislead your Honor. We are not making any contention whatever that a suggestion without being followed by an action of some kind—in other words, I would like in this matter, without any of the implications that the public ascribes to the man, Mr. Lewis—

The COURT: Who?

Mr. KRAMER: Mr. John L. Lewis.

The COURT: Let's not bring Mr. Lewis in this case, Mr. Kramer. Confine your remarks to the evidence here. I am trying to find out the theory of the Government's case.

Mr. KRAMER: The theory of the Government's case is the sending out of the Guide by the National Association is equivalent to a wink.

The COURT: Equivalent to what?

Mr. KRAMER: A wink.

The COURT: A wink?

Mr. KRAMER: Yes, followed by action—not the precise action; we don't claim they were trying to dictate—at least establishes a *prima facie* case when coupled, if your Honor please, with the agreement of each member with the National Association that he should charge whatever rate the Washington Board establishes, bearing in mind that those rates were influenced by the Guide sent out by the National Association.

The COURT: The Guide suggested 5 per cent on the

401 first $100,000.

Mr. KRAMER: Yes; they don't have to adopt each suggestion verbatim.

The COURT: So the Washington Board fixed it at 5 per cent on $50,000.

Mr. KRAMER: They didn't go as high.

The COURT: So it's an agreement on the part of the Washington Board to fix the price in the District of Columbia?

Mr. KRAMER: It isn't a contract, your Honor, but it is evidence of joint action.

Tampering with the price structure, the Supreme Court said, is enough.

I say when the National Association sends out a Guide and expects it to be acted upon, and reports in its minutes that it has been acted upon, if your Honor please,—it doesn't say where and we don't make any contention on that Exhibit 43 says where the action was taken, but it does say:

"As a result of the Committee's activities many Boards are making complete studies of their existing schedules with a view towards changing them to conform as nearly as possible with the suggested National guide. It is interesting to note that the Boards which are changing their schedules are revising upwards."

402 I say that that joint action followed by a recommendation of the National Association, followed by action, and coupled with the agreement of each member, is sufficient to establish a *prima facie* case, subject, of course, to rebuttal, in the estimation of the jury.

But be that as it may, if your Honor please, I make apologies for digressing. What I asked your Honor's permission to talk about was Exhibit 48.

All we say about Exhibit 48 is that Mr. Herbert U. Nelson, speaking for the National Association—although he said yesterday he didn't and if he doesn't who does, and I don't mean to be facetious, but we can't call anybody except people to say what the National Association does or is or thinks—and here we have, throughout the course of time a conspiracy was alleged to be going on, expression as to the purpose of the Committee and the knowledge he had of what other Boards were doing.

And the statement, if your Honor please:

"If all Boards can act together each individual Board will gain confidence and strength from such action."

Of course, if your Honor please, we maintain that that is the type of expression which is relevant. It doesn't

prove it itself, but it is relevant to a consideration of the Court and perhaps, if the Court is of such a mind later on, of the jury.

I think I have said enough and I certainly appreciate your Honor's indulgence.

Mr. WHITEFORD: If your Honor please, sometimes as I read these two letters concerning which Mr. Kramer is talking, I wish that we might have, in another kind of a discussion, the benefit of the philosophy that is set out in these letters; but we are not trying that kind of a case.

I heard Mr. Kramer state what this case is about a number of times. Frankly, I haven't understood him any time.

We had somewhat the same argument before Mr. Justice Letts over in the Equity Court, when he made a motion for judgment in the equity suit, and the basis for the answers we filed, and he admitted the same kind of setup and Code of Ethics, and yet he was not successful in having that motion granted on his theory of the law as it applies to this case.

Our view is that if Mr. Kramer is right in his statement it was criminal to form the National Association in the first place, or at least it was certainly criminal when the Washington Board joined it, in his contention.

Obviously, to say that it is criminal in the first place would have to assume that brokerage was interstate commerce in the States, which it is not.

But certainly to narrow it down to his contention, he arguing that brokerage was trade or commerce in the District of Columbia, the very day that the District of Columbia Association granted the National Association, or the time in 1924 when this Code of Ethics was passed, the crime was complete, according to Mr. Kramer's argument.

I cannot believe that if it were criminal that at least for 24 years the Department of Justice would have let this crime be committed here in the District of Columbia. And I cannot believe that that is a logical argument to make on the basis of this indictment, and I think that your Honor has laid the finger upon the word that is of importance here, from the standpoint of the National Association: What has the National Association agreed to that changed those rates in 1943 and 1944?

Mr. Kramer says it didn't have to agree to anything; they were members of the National Association; they would go on and do it and we couldn't stop them. He agrees we can't stop them no matter what they do with these rates.

but he says we are criminally liable for whatever they did do because they are members of our National Association.

So, your Honor, in light of that argument of Mr. Kramer, comes to the statement, what did the National Association do that affected this District of Columbia situation? And your Honor has pointed out that the Guide, so-called, the piece of literature—and that is all at most it can be—
405 that was gotten up by Mr. Barnard's Committee, and two copies sent to Mr. Rush, and the letter accompanying it, was sent to the Washington Board; and in an effort, realizing that he wanted to try to show that the National Board did something to increase those rates, Mr. Kramer offered this letter and we let it go in.

Now, he is bound by the evidence that he puts in:

"We enclose two copies of the Guide on Commission Rates prepared by the National Committee on this subject" * * * and of course all he talks about is rates; there are a dozen more important things than rates involved—

"We would appreciate your body referring this schedule to some committee or officer interested in the matter of commissions who could compare it with your schedule, definition and customs and give us the benefit of your comments and advice. If you think the Guide would be an improvement on your present practice, will you let us know that fact?"

406 "It is the purpose of our committee this year to try to perfect our guide and to bring the matter of improvement of local board schedules before the delegates at the Detroit convention in November. Recent experiences with Government agencies and with important fiduciary institutions leads your committee to feel that this subject is exceedingly timely and much good can be accomplished if our member boards could agree on certain basic definitions and procedures such as suggested in the guide.

"In order to make reference to any particular section easier, we have arranged the guide on an alphabetical basis. In commenting on any particular item, it would save time if reference were made to the point in question by number and letter.

"Your national committee would also appreciate knowing whether your board has recently revised its schedule and whether the guide has been helpful in this process.

"It would be appreciated if you would respond to this letter within the next two or three weeks."

Mr. Rush said he did not respond to it but put it in the files. The Washington Board had only two copies and we don't know that anyone else had other copies.

That is what they attempt to show we did. We cannot be convicted for sending out literature, and asking for
407 information from the local boards as to what they are doing.

Now, he wants to offer a letter, as I say, the philosophy of the letter and a lot of these letters, if we are going to be trying that kind of a case. He is confronted with a situation here where he has got to prove not a state of mind of Herbert Nelson, not a philosophy as to a code of ethics, not an idea of some four, five, eight, ten, forty or fifty people as to what rates generally are over the country or how they charge them and whether, as one of these letters says, the Government doesn't like to be paying two or three times as much in one place as in another and that comes about because of a lack of definition most of the time, but what are the services? What do you mean when you have a rental management? What is a management fee? What do they do in one State as against another? So they want to have definitions.

Now, he wants to put these two letters in evidence, one to Mr. Saunders who is going to be on a committee and he tries to tell Mr. Saunders what is in his mind and what he would like to accomplish over the country. It is Herbert Nelson's idea, assuming he dictated this letter.

Your Honor, if we are going into that question, the philosophy of rates, rules and customs all over the United States and defend them as having been used in the District of Columbia, we will be here not days but months and I submit that to introduce this kind of testimony takes
408 us away from the real issue that is here. What did we do and what do these letters show that we did?

The reason that I waived our objection to this guide coming in at all in the Government's case was because it seemed to me, when accompanied with the letter, it was perfectly plain why we sent out that piece of literature and it is plain itself and while your Honor points out the difference between the suggestion as to the sales commission of 5 percent on $100,000, I have here a list of differences between those two exhibits. There is no use reading them. It would just amaze you. No wonder Mr. Rush said, "We never looked at them." You laid your finger on one but it is evident, instead of being an agreement, it is a total lack of agreement, in the average that Mr. Barnard's committee had found all over the United States.

I submit the ruling should be that both of these letters should be excluded.

The COURT: What is the other one?

Mr. WHITEFORD: One was to Mr. Larouge. I thought that he insisted on that coming in too.

Mr. LEAHY: No.

Mr. WHITEFORD: If he didn't, then there is no difference in the one to Mr. Saunders and the one to Mr. Larouge that I can see.

The COURT: There is a little difference. I will
409 admit that exhibit.

Mr. KRAMER: Recall the jury.

The COURT: What exhibit is that, Mr. Kramer, do you recall?

Mr. KRAMER: 48.

The COURT: The one I just admitted?

Mr. KRAMER: Exhibit 48.

(The document previously marked Government's Exhibit 48 for Identification was received in evidence.)

(Thereupon, the jury returned to the courtroom and resumed their places in the jury box.)

Mr. KRAMER: Mr. Nelson.

Thereupon

HERBERT U. NELSON resumed the witness stand and was examined and testified further as follows:

Mr. KRAMER: If the Court please, I shall read Exhibit 48 which your Honor has admitted, to the Jury. It is on the letterhead of the National Association of Real Estate Boards, 1737 K. Street, Northwest, Washington 6; February 27, 1946:

"Mr. A. R. Saunders
Lansing, Michigan.

"Dear Bert:

"President Barnard has appointed you a member of our Rates and Rules Committee, which is to be headed by
410 Daniel F. Sheehan of St. Louis. Our plan is that each of our Institutes shall nominate one man to serve on this Committee. The Secretaries Council has nominated you, and President Barnard has therefore appointed you.

"The task of this Committee is to seek to bring increasing order out of the somewhat confused rules of our Member Boards with reference to fees, commissions, and charges for services. This can be done by seeking uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of the charge.

"The Committee has already made one report of which I enclose a copy. Now that the war is over, this work should be continued for the benefit of Realtors everywhere.

"In dealing with the Federal Government, there is, of course, great advantage in having logic and some uniformity in our charges. In the case of management fees, the government can see little point in paying twice as much in one community as in another. Some of the larger insurance companies have also made the same comment.

"Generally speaking, most Boards have charges which are probably too low in relation to present costs of doing business. Often a Board will hesitate to increase its charges, fearing to lose business. If all Boards can act together, each individual Board will gain confidence
411 and strength from such action.

"It is hoped that you will be willing to serve on this Committee, which will have its first meeting in Chicago on Wednesday, May 8, at the Congress Hotel. This meeting will last all day and will begin at 10 a. m. Please come if you can.

Sincerely,

(Signed) HERB NELSON
Executive Vice President."

: Enclosure

412 Direct Examination (Continued).

By Mr. KRAMER:

Q. Mr. Nelson, I hand you Exhibit 48 and ask you to tell me if you can remember now, when you wrote that letter about a year and a half ago, what the enclosure was in it?

A. No, I cannot, sir.

Q. If you should remember before you leave the stand or thereafter, I wish you would advise counsel.

Mr. Nelson, turning for a moment to Exhibit 7 you will notice there that you, as executive vice-president, are charged with the selection of a staff. Are you familiar with that provision?

A. Yes, sir.

Q. Can you tell me how much of a staff, prior to August 27, 1947, the National Association had in numbers?

A. About 60 persons.

Q. How many of those were in Chicago, roughly, and how many in Washington.

A. About 40 in Chicago and about 20 here.

Q. Were any of the members of what you call the staff serving or assisting the realtors in the work of the Committee on Rates, Rules and Customs?

A. Not directly except that Miss Jones, our librarian, that one of her duties is to collect information for member boards of all types and this was made available to
413 the committee as a part of the regular library service that we have for the public and for people who are interested in our members.

Q. Was Miss Jones also director of information as well as librarian?

A. Yes, sir.

Q. She was director of information on August 27, 1947?

A. That is her formal title, that is right.

Q. Did this Committee on Rates, Rules and Customs have secretaries, that is, a man who would serve as the secretary to the committee?

A. No. The arrangement is not that formal. We provide a stenographer for a meeting, that is all, and it could be the same person repeatedly but very often it is not.

Q. Are you familiar with Mr. Henry Price?

A. Yes; he is a lawyer.

Q. Here in the District?

A. That is right.

Q. Was he ever employed by the National Association?

A. Yes, indeed.

Q. I don't mean as a lawyer. Was he ever employed in any other capacity?

A. He was counsel and secretary to the realtors Washington Committee.

Q. He was not secretary to the Committee on Rates, Rules and Customs?

414 A. He sat with them at one time.

Q. Do you remember him when he sat with them?

A. That was before the war, before he got into the Navy. It must have been 1942 or '43 or thereabouts.

Q. Were stenographic notes made by the stenographers of the committee on Rates, Rules and Customs?

A. No, sir. Our practice is not to take verbatim transcripts of these meetings. They are informal discussions and, as a rule, the minutes of a committee meeting are simply a digest of what was done and the attendance and things of that kind.

Q. Were verbatim transcripts kept of the meetings of the Executive Committee and the Board of Directors?

A. Never that I recall.

Q. Did you ever have a stenographer in there who was taking down most of what was said?

A. Not quite that. We have a stenographer attend all of our directors' meetings and she uses her best judgment to take down action. We don't take down the debate and all the information discussed.

Q. Do you know if you preserved those stenographic records?

A. I don't think so.

Q. Are you sure, one way or the other?

A. I am sure we don't, as a practice. Whether
415 they exist in some notebook some place or another I don't know.

Q. My associate tells me that I have not gotten the record straight as to whether a stenographer was present at committee meetings of the Committee on Rates, Rules and Customs. You did testify with respect to the Executive Committee meetings and the Board of Directors. How about the Committee on Rates, Rules and Customs? Would they have a stenographer present?

A. It was very informal. Sometimes the chairman in these meetings would say "We would like to have a stenographer come in for a little while so I can dictate a summary of the meeting." This is not corporate business procedure. We are just a voluntary association for discussion.

Q. Mr. Nelson, I would like to return for a moment to this magazine called the National Real Estate Journal and the roster number thereof and I would like to show you the roster number for 1945.

Mr. KRAMER: Will you mark this for identification, please, Mr. Clerk.

(National Real Estate Journal, roster issue for February, 1945, was marked Government's Exhibit 50 for Identification.)

By Mr. KRAMER:

Q. I hand you Government's Exhibit No. 50 for Identification and ask you if you saw that at any time prior
416 to August 27, 1947?

A. Well, I am sure I did. It was published in February.

Q. You are familiar with the magazine as you look at it?

A. Oh, yes.

Q. I want to call your attention to two pages in this magazine, Mr. Nelson. You will notice, commencing on page 49 in this magazine, material which I don't want to describe to the jury as yet. You see that material?

A. Yes.

Q. So far as you know, did any employee or officer of the National Association compile that for the use of the editor or publisher of that magazine?

A. They did not.

Q. They did not?

A. No.

Q. You are absolutely certain of that?

A. Yes, I am certain. I know where it was obtained and how it was handled.

Q. I want to make sure that you know what I am talking about. I am not talking about this (indicating), but this.

A. No, the digest.

Q. Anybody who said you did is mistaken as far as you are concerned?

417 A. That is right.

The Court: Wait a minute.

Mr. Kramer: I think we ought to strike that remark. May I move to strike it?

The Court: Yes.

Mr. Kramer: Those are all the questions I have to ask of this witness at this time, your Honor.

The Court: What do you mean "at this time", Mr. Kramer? Are you through with the witness or do you want to ask him some more questions?

Mr. Kramer: I am through with the witness.

The Court: All right.

Cross Examination.

By Mr. Whiteford:

Q. Mr. Nelson, Mr. Kramer referred to a question of whether or not you had any stenographic notes or records at the National Association dealing with the actions or discussions of the Committee on Rates, Rules and Customs. When was it that Mr. Kramer and his associate, Mr. Maletz, came to the Chicago offices, NARE 3, in Chicago?

A. About a year and a half ago.

Q. That was in April, 1946? wasn't it?

A. Yes.

Q. And they were there a number of days?

A. Yes, sir.

418 Q. And every facility was offered them to go through all your books and papers and files?

Mr. Kramer: Objection, your Honor, and may I state the ground of the objection? Mr. Nelson was not in Chicago at the time so he merely knows about what happened, and he got his information through someone else.

Also, your Honor, I state as a member of the bar of this court that I have never been in the offices of the National Association in my entire life.

Mr. WHITEFORD: Did you have representatives do it?

Mr. KRAMER: The Department had representatives, I will stipulate to that, but I am saying he is not speaking from his own knowledge and he makes slips like that.

Mr. WHITEFORD: But you attempted to leave the inference that there might be some papers that would show some secret report of some kind that had not been disclosed and I wanted to show that your agents were out there, that is all, and they had access to the office. That is all I want to show. As long as you agree that that is so—

Mr. KRAMER (interposing): We stipulate that the agents of the Department were in Chicago.

Mr. WHITEFORD: And were given access to all the files?

Mr. KRAMER: We do not stipulate to that fact.

Mr. WHITEFORD: Do you contend you were refused any of them?

419 Mr. KRAMER: We do not.

Mr. WHITEFORD: All right.

By Mr. WHITEFORD:

Q. Mr. Nelson, this letter that you wrote to Mr. Saunders in February of 1946 that was read to the jury; Mr. Saunders, you say, is a realtor in Lansing, Michigan?

A. He is not a realtor. He is an employed secretary of the Michigan Association of Real Estate Boards.

Q. That is a State association of real estate boards?

A. Yes, sir.

Q. So he was appointed on the Committee on Rates, Rules and Customs in 1946?

A. Yes, sir.

Q. (Reading) "Our plan is that each of our institutes shall nominate one man to serve on this committee." What do you mean by "institutes"?

A. We have large functional committees representing the different branches of the real estate business and different activities of real estate boards and we call them institutes. We have a brokers institute.

Q. Will you speak a little more distinctly, please?

A. We have a brokers institute, a management institute, appraisal institute and we also have a section council consisting of the section of local boards and of State associations. There are some 300 members of that council

420 and Mr. Saunders was the nominee or the suggestion of that council to serve on this particular committee.

Q. In these institutes, are they professional in character?

A. Yes, sir. They are organized for educational purposes and they carry on courses and training in the universities and in the real estate boards.

Q. What do you mean "carry on courses of study at universities"? You mean the members do or they provide courses of study for students?

A. The institutes organize these educational courses, organize the material and provide the instructors and the courses are offered to our members and their employees and to the public quite often.

Q. At various universities?

A. Yes.

Q. Where, for example?

A. In some 70 universities, we have these courses; Michigan, Northwestern, at Wisconsin University, all over the country. There are some 70 universities which give these courses.

Q. That is part of the activity of the National Association through its institutes?

A. Well, our major activity is educational.

Q. You say, "The task of this committee"—that
421 is, this committee that was being appointed in February, 1946—"The task of this committee is to seek to bring increasing order out of the somewhat confused rules of our member boards with reference to fees, commissions and charges for services. This can be done by seeking uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of the charge."

Will you elaborate a bit on what you mean by "seeking uniformity in definitions and basis of charges" and the necessity for it?

A. Yes, sir. In some communities, the word "management" means merely rent collecting. In other communities, it may mean collecting rents, employing the building employees and assigning them their duties and supervising their duties plus handling repairs and maintenance; seeing that repairs are made to the building plus offering space that becomes vacant and securing tenants for vacant space.

Various definitions of management may include just one of those functions, rent collecting, or it may include two or three of them or all of them and, of course, there is a tremendous difference in the service that is implied in these different definitions. So people who handle a great deal

of property throughout the country, Government agencies and large insurance companies and large corporate interests who have property in different cities naturally
422 are confused and they want to know what does "management" mean and why is the fee one-half or one-third in one community what it is in another.

Q. And is that apparent difference due to the lack of definition rather than to a difference in the value of the service?

A. Yes, sir, and the definition is basic.

Q. You say Government agencies were confused or raised these questions. To what Government agencies do you refer that own and operate properties throughout the United States?

A. Well, there are over a hundred agencies in the Federal Government that own, operate or lease property throughout the country. It started a long time ago with the Home Loan Bank System which is involved, of course, in real estate operations of all kinds. The Home Owners Loan Corporation has for years been active in the ownership and the management of property.

Q. The Home Owners Loan Corporation was a corporation formed back somewhere in 1932 or '33 from which the Government loaned money to those whose houses were about to be foreclosed to the extent of some four or five billion dollars, is that not so?

A. Yes, sir. At the instance of Senator Cordell Hull from Tennessee I came down here and we worked out that idea of a corporation to help rescue all these homes
423 and the corporation ultimately took over almost a million homes and refinanced them for the owners and, of course, they had an immense management problem. They had hundreds of thousands of homes scattered all over the United States. They saw no reason for paying one fee in one community and another fee in another community so they naturally asked us about that and we tried to work out some arrangement that was satisfactory to them. They had a certain uniformity in their appraisal fee. They worked out about a $15 fee for appraising a house which was pretty uniform throughout the country. That was their offer which was generally accepted. They worked out generally uniform management and sales fees and those were generally accepted and that was done as a service by the local real estate boards to this agency.

We had the same problem arise in connection with FHA which our group sponsored; developed that idea and spon-

sored the FHA program and, incidentally, we are the only group that came down here and tried to make the sale to Congress which we were successful in doing. We appraise every piece of property on which they make a loan. Appraisal fees were necessary as part of their operation and a big part.

We had the same problem in connection with the tremendous real estate problems of the Navy and the Army during the war. They acquired $20,000,000,000 in real property in a very short time and the acquisition
424 problems that were involved, procurement problems, were such that we had to call in hundreds of our people as advisors and we had to work on these questions of, "Well, what is it going to cost," and everybody was anxious in this war operation that it should cost as little as possible; that it be done carefully and so we inevitably got into the question of rates for our services as well as the prices at which these properties were to be procured.

Q. And was it in all that activity—by the way, there was another one. Do you remember the dates of the code, the Blue Eagle?

Mr. KRAMER: Objection, your Honor.

The COURT: You are objecting to what?

Mr. KRAMER: The reference back to the NRA, that is all. It seems a little remote.

I withdraw the objection.

By Mr. WHITEFORD:

Q. All right. In the days of the Blue Eagle, when codes in all industries were being set up, was your attention directed to all of the divergencies in definitions and charges in those years all over the United States? Did you have anything to do with trying to work out that code? Just answer yes or no.

A. Yes, sir.

Q. In doing that did you begin to realize what a confused matter it was? You use an expression here, "Bring
425 about increasing order out of the confused rules of our member boards". Is that what you refer to and is that how you found out about it?

A. Yes, sir.

Q. You say, "This can be done by seeking uniformity in the definitions and basis of charges without in any way seeking to suggest the actual amount of the charge." While we are on that, did you ever suggest, you or any committee that you know of in the National Association, ever suggest to the Washington Board in the District of Columbia what its rates, fees or charges should be?

A. No, sir, I never did.

Q. You never did?

A. No, sir.

Q. Did you ever talk to any member of the Washington Board as to what its schedule of rates, fees and charges would be?

A. I have never discussed the schedule of the Washington Board with anyone in Washington that I know of.

426 Q. Is that a matter that the National Association disciplines and enforces, or is it done by each local board as it sees fit?

A. It is done by each local board.

Q. Some reference was made, while we are on that subject, to the disciplinary action or expulsion of a board if it fails to obey the Code of Ethics, and that is written in the Constitution, as I recall it.

Why was that clause put in the Constitution, and who wrote it, and what was the idea behind it?

A. Well, sir, it has been in there quite a few years, I think some fifteen years, and it was prompted by certain abuses in the business that developed during the depression years.

Q. For example?

A. I suppose what they had in mind when they drafted that by-law—I don't know who drew it in detail but I remember generally discussion—it was prompted by certain rackets that developed during the depression years. We used to have what we called the free lot racket.

Q. Explain the free lot racket?

A. It consisted of a lot being given away to a person if they would come and claim it, and the profit lay in the closing fees and the title searches, and things of that kind.

427 These lots usually consisted of very poor land; unsuitable for homes, and that kind of thing, but the public was also misled by the idea that they could get a lot for nothing.

Mr. KRAMER: Objection, if your Honor please.

Mr. WHITEFORD: That is one of the abuses that is in the business and it explains our Code of Ethics, Mr. Kramer, and as long as you have opened this up you are going to have to listen to this for a long time, if I have anything to do with it.

Mr. KRAMER: The only objection I have is that he stated the public felt.

The WITNESS: I said the public was misled.

Mr. KRAMER: And how do you know people were misled?

The WITNESS: Well, we received plenty of complaints both from the Better Business Bureaus, and from newspapers, and from letters from the public to know that the public was misled.

By Mr. WHITEFORD:

Q. Is that one of a number of the evils that is in the real estate business generally, that your Code of Ethics and this particular section of the Constitution were designed to stop?

A. Yes, sir.

Mr. KRAMER: Excuse me. May I inquire of what section you are speaking, Mr. Whiteford? I don't think you have ever identified it.

428 Mr. WHITEFORD: It is the same one you read yesterday, and you have argued here. It is Section 9 of the Code of Ethics, for one, and the constitutional section that you read yesterday that you say enables the National Association to discipline the Boards, and that is what I am asking, what it was written for. You read it yesterday.

Mr. KRAMER: I have it now; thank you.

A. May I add, Mr. Whiteford, something on that particular item?

The Code prompted also the initiation of what we call Real Estate License Acts, and we have those now in 38 States. Those were built around the philosophy of the Code, and the Code is incorporated, either by reference or sometimes by citation, in some of the license laws and in the regulations that are issued under these laws.

It was an effort to clean up the abuses in the business.

By Mr. WHITEFORD:

Q. The license law to which you refer is a law passed by Congress in the District of Columbia and by various State Legislatures to license real estate men, is that right?

A. Yes, sir. We requested such a law as a method of policing the members of this calling whom we could not draw into our own voluntary association.

Q. And that is commonly known over the country as the McChesney Act?

429 A. Well, the Real Estate License Act.

Q. It was originally written by General McChesney, who was at that time counsel for the Association?

A. He was one of the authors.

Q. And did you sponsor that Act in the District of Columbia and get its passage here?

A. Yes.

Q. And it is that Act that was referred to the other day by Mr. Leahy, when Mr. Rush was on the stand, that there were some four thousand people in the District of Columbia licensed under it?

A. Yes, sir.

Q. You say: "This can be done by seeking uniformity in definitions without in any way seeking to suggest the actual amount of the charge."

Is it or not feasible to have a universal charge for these services?

A. Mr. Whiteford, it would not be practical, because of the different costs of doing business in different size communities and the different values of the properties, and we find generally in the smaller towns, contrary to what you might believe, where values of the property dealt in are low, and where the volume is correspondingly low, the charges are often higher than they are in the larger cities.

Q. You mean the going rate?

430 A. That is right.

Q. Among brokers generally?

A. That is right.

Q. And that is what you found out?

A. That is what we found out, and the going rate for services is found to reflect the cost of doing business; it couldn't be otherwise.

Q. A man couldn't stay in business if he couldn't operate at some profit?

A. Of course.

Q. (Reading) "The Committee has already made one report, of which I enclose a copy. Now the war is over this work should be continued for the benefit of Realtors everywhere."

Would that copy, that report you referred to, by any possible chance—you said you couldn't remember what it was; I was wondering whether it was the report that Mr. Barnard's Committee made in 1941, two copies of which were sent down to the District of Columbia with that letter; you were sitting in the court room and heard it; is it possible that is what you are referring to in this letter?

A. I would assume so, but I don't remember.

Mr. Kramer: If your Honor please, I object to what he assumes.

The Court: Sustained.

431 By Mr. Whiteford:

Q. Have you any recollection of any other report that it would likely be?

A. No, sir.

Q. Now, Mr. Nelson, I want to refer to the Code of Ethics and this so-called Schedule of Rates, Fees and Charges.

You have said, I think, that the National Association never has forced upon local boards or upon the District Board, or its members, the charging of any particular rate, fee or commission of any sort?

A. No, sir.

Q. Now, referring to Article 9 of the Code of Ethics:

"The schedule of fees established by the various Real Estate Boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor."

Can you tell me whether you had any part in writing that language?

A. I don't think so. I was a part of a drafting committee with Dr. Ernest Fisher, who is now a Professor at Columbia, in 1924, and he did a part of the drafting and I did a part of it.

Q. And you don't remember which one of you wrote the paragraph in 1924?

432 A. No, sir, and I am quite sure that that particular part of the Code I did not draft.

Q. You say this was written in 1924, and adopted in 1924?

A. Yes, sir.

Q. This Code?

A. Yes, sir.

Q. You being on the Committee at the time of its adoption—

A. (Interposing) I was not on the Committee, sir.

Q. I thought you said you were part of the drafting committee?

A. I sat as a part of the committee, as its draftsman, but not as a member of the committee.

Q. Well, what I would like to get from you is your interpretation, or the National Association's interpretation, either or both, of the clause that I have just read you:

"The schedule of fees established by the various Real Estate Boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor."

You say that is not compulsory and you never enforced it. What do you mean by that language?

A. Mr. Whiteford, we had in mind at that time establishing a method of charging for services in brokerage
433 and in other fields of real estate activity.

There were at that time, in the 'twenties and for a long time subsequent, many ways of having a broker compensate himself for his services.

One of the worst abuses we had was dealing in options. A broker would go to an owner and say, "I will take an option on your property for 30 or 60 days," and then he would sell the property for whatever he could get and keep the difference.

What happened there was that the broker was in effect the speculator in the property of his client, and it led to a great many law suits and abuses of all kinds, and was the result of public criticism, and even in some States resulted in legislation.

Q. How about net listings?

A. Another abuse was compensation through a net listing.

Under that method a broker would go to an owner of property and would say, "What do you want for your property net to you?"

And if the owner said, "$10,000 for my home," the broker would then have the exclusive right to sell that property and he could keep whatever he got over the $10,000, which made it a contingent fee, or, again, a speculative fee.

And he might sell the house for $15,000 and make
434 an unconscionable profit for his services, and that resulted in a great deal of criticism.

And so the custom grew up of establishing compensation for a broker's services upon the basis of a percentage of the value of the property: 5 per cent, 3 per cent, 4 per cent, 7 per cent, on different types of activity.

On farm lands it used to be for years 10 per cent, because of the greater cost of showing that kind of property.

Q. That idea was encouraged to overcome these illegal and dishonest methods?

A. That is right, and we were primarily after establishing uniformity of definition and uniformity of a method of making these charges that would eliminate all of these abuses, and many of them are now outlawed, and I mean outlawed by these license laws.

Q. Was there any intention to prohibit an individual broker from making any fair, honest agreement with his client that he wanted to make, when you passed this?

A. It was in everybody's mind that that was an impossibility. Any broker and any owner, of course, has a right to make any agreement he wants.

Q. That's right.

A. And whatever regulations the local board passed were in our mind a guide in the application between the owner and the broker. So that if in an employment contract signed between the owner and the broker there were no other agreement, then the going rate in the community, as reflected by the schedule of the Board, would obtain, and that was the primary purpose of these schedules of commissions.

Q. So that the broker could work for less than the going rate or more than the going rate, or any basis that he agreed with the owner?

A. Yes.

Q. Free to do it today?

A. Yes.

Q. Free to do it in the District of Columbia as far as any action of the National Association is concerned, that you know about?

A. Yes, sir, as far as we are concerned they can make any agreements they want.

Q. Would such agreements made be construed to be a violation of Article 9 of this Code of Ethics?

Mr. KRAMER: What agreement?

Mr. WHITEFORD: Any agreement that the broker in the District of Columbia may make, or anywhere else, with his client, would that be construed to be a violation of Article 9 of this Code of Ethics?

A. No, sir.

By Mr. WHITEFORD:

Q. No question about that?

A. No; we have never had a suggestion that Article 9 should be so interpreted.

Q. If it were so interpreted would you want it in there?

A. No, sir.

Mr. KRAMER: I move that the last question and answer be stricken, your Honor. It is an "iffy" question.

The COURT: That may be stricken.

Mr. WHITEFORD: That's all right.

By Mr. WHITEFORD:

Q. Mr. Leahy calls my attention to the fact that I didn't ask you about one other paragraph here: You say:

"Generally speaking, most Boards have charges which are probably too low in relation to present costs of doing business. Often a Board will hesitate to increase its charges, fearing to lose business. If all Boards can act together, each individual Board will gain confidence and strength from such action."

What was your reason for writing that? What is the philosophy behind it and what were the facts that prompted that statement?

Did you know of brokers that were charging too little money, and were they going out of business? Or were they engaging in false practices? Which is the philosophy behind that, or if it is not either one of those, would you tell us what it is?

437 A. Well, in the first place, Mr. Whiteford, the costs of doing business, maintaining offices, advertising, and everything else, have almost doubled in a 10-year period, and there has been no change in the rates, and the gross earnings of most offices have not doubled, so that with an increased cost of doing business we had a great many men going out of business; they simply couldn't survive, and whenever any calling is under too great pressure, in so far as its income is concerned, you always get people who cut corners.

Q. What do you mean by cutting corners?

A. If you are managing a piece of property you might take a rebate on material bought for repairing the property, or charging a little extra commission with the plumber or the repair people that are brought in, a secret commission, and things of that kind, and the abuse always grows up whenever you get a situation of that kind.

Q. That was the same kind of condition that you referred to in the Code of Ethics that prohibits a Realtor from doing that very thing?

A. Yes, sir.

Q. Therefore, is it your argument here that what he should do is to procure for himself an adequate rate, rather than to take the short-cut and in effect cheat the principal?

438 A. Yes, sir, but, Mr. Whiteford, I want to point out that that is only my own personal observation and I am in no way the spokesman for our Association.

Q. It is your philosophy?

A. Well, we have in the constitution a regularly constituted body and group of elected officers, not employees, who speak for this organization, and properly so. They are the leaders of the calling.

Mr. Whiteford: That is all.

Cross Examination.

By Mr. Leahy:

Q. Mr. Nelson, was this a personal letter that you wrote to Mr. A. R. Saunders back there on February 27, 1946?

A. Yes, sir, if I understand the word "personal".

Q. That wasn't for publication generally, was it?

A. No, sir.

Q. You didn't make carbon copies and send it all over the United States to all the member boards you have in your Association?

A. No, sir. I wrote that letter, or at least the first paragraph of it, under instructions from our then president, to notify the persons named that they were members of this committee. It was a routine administrative function.

Q. And that was the main purpose you had in writing that letter?

A. Yes, sir.

439 Q. To ask him whether or not he would become a member of the committee, and expressing in the last paragraph;

"It is hoped that you will be willing to serve on this committee, which will have its first meeting in Chicago on Wednesday, May 8th, at the Congress Hotel. This meeting will last all day and will begin at 10 a. m. Please come if you can."

That was the main purpose in writing the letter, wasn't it?

A. Yes, sir. The first and last paragraphs are the only ones that are germane. The others are *ultra vires*.

Q. And definitely can you say it is your recollection now that you did not send a copy to any member of the Washington Board?

A. Not of that letter.

Q. You did not send one?

A. No, sir.

Q. So far as you know, up until today, do you know whether any member of the Washington Board ever heard about it?

A. I have never heard of anything from any member of the Washington Board about this letter.

Q. And you personally took no steps whatsoever to acquaint any member of the Washington Board with this particular letter which I have in my hand?

440 A. No, sir.

Q. It was none of the Washington Board's business, was it?

A. No, sir.

Q. It was a purely personal request upon your part, or acting for the committee, or your organization, to seek

to obtain membership of Mr. Saunders upon this particular committee?

A. Yes, sir.

Q. When you wrote it, did you write it with the intent of engaging in a conspiracy to restrain trade or commerce in the District of Columbia?

A. No, sir.

Q. Did you try to persuade Mr. Saunders, by this letter, in inviting his membership on this committee, to become a co-conspirator in order to restrain trade or commerce in real estate in the District of Columbia?

A. No, sir.

Q. Did you write it with any idea or hope by way of suggestion that you might raise rates or commissions for the sale, management, lease or appraisal of real estate in the District of Columbia?

A. No, sir.

Q. Did you have anything with reference to the real estate business of the District of Columbia in your
441 mind at all when you wrote it?

A. No, sir.

Q. Or did you have any over-all purpose in your mind of establishing any policy in which later you had the purpose of introducing the Real Estate Board of the District of Columbia?

A. No, sir.

Q. You stated, I think, in answer to Mr. Whiteford's question some objections which the agencies of the Federal Government had to the confusing conditions which existed throughout the country, in the management of the various properties which they had under the Federal Agency's jurisdiction. You said:

"Here, too, some of the larger insurance companies have also made the same comment."

Is that true?

A. That is true.

Q. And isn't it true that large insurance companies loaned tremendous sums of money on real estate throughout the entire United States?

A. Yes, sir.

Q. And weren't they in turn subjected to varying charges for management, appraisals, and lease-fixing, and all such business as that, throughout the United States?

442 A. Yes, sir.

Q. And wasn't it a fact that similarly you could make a fairly good definition of the amount of services involved in a given activity? Isn't that true?

A. Yes, sir.

Q. But nevertheless the charge for that amount of service varied throughout the United States?

A. Yes, sir, and it would have to.

Q. And it would have to?

A. Yes, sir.

Q. And in some communities it would be varying, too, wouldn't it?

A. Yes, sir.

Q. And didn't you have complaints from the insurance companies in that regard?

A. Yes, sir.

Q. And requests to adjust it, if possible?

A. Well, they didn't request formal action, Mr. Leahy, of any kind.

Q. Well, advice.

A. They expressed themselves as being put to extra expense and annoyance and difficulties in doing business.

Q. And is that what you refer to when you say that:

"In dealing with the Federal Government (and may I interpolate there insurance companies) there is, of
443 course, great advantage in having logic and some uniformity in our charges."

A. Yes.

Q. But with reference to that did you at any time have in mind, in writing this letter or formulating this committee, that you should dictate the charges for commissions for selling or leasing or managing real estate in any particular community?

A. No, Mr. Leahy. May I comment there?

Q. Yes.

A. —and say that our Association is a Federation of over a thousand local real estate boards, and its most important and useful function is to act as a clearing house, which makes it in effect an informative and an educational institution.

And there is nothing in our constitution that indicates that we can discipline or manage these local units. We are a federation with very limited powers, and one of the powers we are granted is defining a jurisdiction and the Court is defining the use of the term "Realtor," but that's about all there is to it.

The Code of Ethics is an ideal which we hold up and which our member boards feel represents good practice, both from the public standpoint as well as his own.

Q. And in the matter of internal administration of
444 its own affairs, the National never interferes with the Local Board?

A. That is right.

Q. Mr. Whiteford just made the suggestion, after all the writing of this letter and the formation of this committee, did it ever function?

A. The committee never functioned. The function of the committee is particularly to assemble information and organize it, and I don't appoint the committee.

445 Q. As a matter of fact, if the committee was ever formed, it never functioned?

A. That is true.

Q. Never got out a report?

A. That is right.

Q. Never disseminated any information, so far as you know, to any of the local boards?

A. No.

Q. Let me see if this is true. As I understand from what you say now, Mr. Nelson, your organization is a Federation whose objective is the accumulation and supplying of what you call valuable information to the local boards.

A. Yes, sir. It resembles the old professional societies.

Q. And is that service all that you render to the local boards, the supplying of information?

A. Yes, interpreted broadly.

Q. You don't try to influence the action of the local boards?

A. Only to the extent that we hold up this ideal in the Code of Ethics and we try to convince them and admonish them if they are engaged in practices that we think are not good, to improve.

Q. Specifically, in getting down to this charge which we have been trying here for the past four days, did you
446 ever engage in any conspiracy with the Washington Real Estate Board or any of its officers, directors or members in any way in agreeing upon or fixing rates of commission to be charged by the members of either the National or Washington Board in the District of Columbia for acting as agents in the sale, exchange, lease and management of real property and improvements thereon?

A. No, sir.

Q. Did you ever have anything whatsoever to do with a vote which was taken on February 16, 1943, in which a certain schedule of commissions was adopted by the Washington Board?

A. No, sir; and I never heard of such a vote and did not know about it until I heard about it in this court.

Q. Did you ever have anything whatsoever to do with the fixing, not only of the sale of real estate as disclosed in that circular of February 16, 1943, or another one in December of 1944?

A. No, sir.

Q. Did you ever know anything about it?

A. No, sir; not until the last few days when I have heard it discussed here.

Q. I will ask you the same question with regard to fixing rates on management in the District of Columbia.

A. No, sir.

MR. LEAHY: I believe that is all.

447 Re-direct Examination.

By Mr. KRAMER:

Q. Mr. Nelson, I believe you testified, "That there is nothing in our constitution which says that we can discipline any of the local boards". Is that right? Did you testify to that effect?

A. Well, sir, I think I have testified that there is in Article 3 that you showed me awhile ago where we can expel a member board for cause.

Q. What cause?

A. For non-observance of the Code of Ethics.

Q. Thank you.

A. May I say that power has never been used.

Q. Have you ever had any violation of the Code of Ethics on the part of the members of the Board in Washington brought to your attention?

A. No, sir.

Q. Exhibit 48 you wrote, did you not, on the letterhead of the National Association of Real Estate Boards?

A. Yes, sir. I dictated that letter. I did not write it.

Q. You didn't mean to testify, in answer to Mr. Leahy's question, that this was a personal letter in the sense it was not written in your capacity as executive vice-president?

448 A. I understood Mr. Leahy's question, Mr. Kramer, to mean did I write to this one individual and, in that sense, the letter was personal.

Q. But you did write it in your capacity as executive vice-president, did you not? Look at it, please.

A. Yes, of course.

Q. When these insurance people came to you and other Government people and told you they saw no reason for paying one fee in one community and one in another, did you tell them, "I am sorry but that isn't any business of the National Association. We don't have anything to do with rates," or did you discuss the matter with them and tell them that you would see what you could do?

A. I discussed the matter with them. I told them who to communicate with in the various cities to see if the Government agency itself could negotiate with the different cities in which they did business to get some uniform understanding which they had a perfect right to do.

Q. You merely referred them to the appropriate local board?

A. That is right.

Q. Did any Government agency or representative of the Government ever tell you orally or in writing that the rates of the Washington Board were too low in relation to present costs of doing business?

A. Did any agents of the Government?

449 Q. Did any agency of the Federal Government ever tell you that the rates were too low?

A. No, sir.

Q. In relation to the cost of doing business?

A. No, sir.

Q. You are not suggesting that the increase in rates or, if you prefer, the change in rates in the District was brought about as a result of a suggestion of a Government agent, are you?

A. No, sir.

Q. You testified when your own counsel asked you about the high cost of living, is it not true, that real estate has also risen in value in the last four or five years?

A. Somewhat.

Q. And is it not true that brokers are generally paid in the District of Columbia and elsewhere by virtue of a commission which is based on the amount of the sale price?

A. Yes, sir.

Mr. Whiteford: If your Honor please, I don't know—

Mr. Kramer (interposing): If counsel moves to strike what he asked the witness, I will be glad to take out anything on the subject.

Mr. Leahy: Go ahead.

Mr. Kramer: Thank you.

By Mr. KRAMER:

450 Q. So that, as the cost of real estate rises, the return of the broker will rise, that is, the actual amount of dollars he gets in commission?

A. Yes, sir; but not necessarily in the same proportion, sir.

Q. You testified, did you not, that you have on occasion admonished local boards that were not living up to the Code of Ethics or did I misunderstand you?

A. Yes, sir. We have in the somewhat remote past, especially on this matter of countenancing locally what we call the "free lot racket".

Q. No, I had reference only to Article 9. I am sorry, I should have said so.

A. No, sir, we have not.

Q. You didn't testify on direct examination that when one broker charged unconscionably high fees and it came to the attention of the National Board, he was admonished?

A. No, sir, we never took individual action with respect to any individual realtor. That was not our business. We considered these problems on a very broad and general basis and we were trying to eliminate what the public felt, as expressed through Better Business Bureaus and as expressed through newspapers and so on as to what the public felt, were abuses on net listings and on option transactions.

451 Q. Do you know whether you have ever received complaints of unconscionable fees from members of the public?

A. In Washington?

Q. Well, let's start with Washington, yes.

A. No, sir.

Q. Did you, by any chance, ever write a letter to a realtor, that you can now recall, or to anyone else that you could produce in court telling them Article 9 of the Code of Ethics and Article 3 of the By-Laws was merely advisory?

A. No, sir.

Q. You were asked by your counsel on direct examination concerning the real estate brokers license law in the District of Columbia. Have you read that?

The COURT: Mr. Kramer, I don't understand what you mean. You said that this witness was asked by his counsel on direct examination.

Mr. KRAMER: On cross examination. Excuse me, your Honor.

By Mr. KRAMER:

Q. Concerning the District of Columbia real estate brokers license law, do you remember being asked about that by Mr. Whiteford?

A. Yes, sir.

Q. Is it your understanding, and I am only after your understanding, that in that law there is anything said about the Code of Ethics of either the Washington Board
452 or the National Association?

A. I have not read the District of Columbia license act but most of these laws were based on the same philosophy which we had in our Code of Ethics and set up new standards as to fair dealing and as to definition of what constitutes "fraud".

Q. Is it your impression—are you under the impression that there is anything in the District of Columbia code or in the real estate brokers license law thereof that fixes the rate of commission to be charged by brokers in this district? Are you under that impression?

Mr. WHITEFORD: Nobody contends that and what he thinks is immaterial.

Mr. KRAMER: I withdraw the question in view of your statement, Counsel.

Mr. WHITEFORD: I didn't ask anything that indicated that at all.

By Mr. KRAMER:

Q. Calling your attention to Exhibit 48, the fourth paragraph thereof, you say:

"In dealing with the Federal Government, there is, of course, great advantage in having logic and some uniformity in our charges."

You didn't mean by that, did you, identity of charges in each of the cities, including the District of Columbia?

A. No, of course not.

453 Q. You then say:

"In the case of management fees, the Government can see little point in paying twice as much in one community as in another. Some of the larger insurance companies have also made the same comment."

Do you know if any of those comments that the Government didn't want to pay twice as much in one community as another had any reference to the District of Columbia?

A. No, sir, I don't think they did.

Q. You don't think they did?

A. No.

Q. Mr. Nelson, I hand you Government's Exhibit 43 in evidence and show you page 7 thereof and call your attention to the fact that that is your report that you wrote to the best of your knowledge?

A. Yes, sir.

Q. And ask you who gave you the information in the last two sentences:

"As a result of the committee's activities many boards are making complete studies of their existing schedules with a view toward changing them to conform as nearly as possible with the suggested national guide. It is interesting to note that the boards which are changing their schedules are revising upwards."

Who gave you that information?

454 A. I can't tell you the specific source of a broad general statement like that. It may have come, in part, from the staff members and, in part, from those who were studying the subject.

Mr. KRAMER: That is all, if the Court please. No further questions.

Mr. LEAHY: Might I ask just a few questions?

THE COURT: Yes.

Re-cross Examination.

By Mr. LEAHY:

Q. You were asked the question whether any Government officer had ever complained to you that the rates for commissions in the District of Columbia were too low. Do you recall that question?

A. Yes, sir, I do.

Q. Did any of them ever complain they were too high?

A. No, sir.

Q. By the way, do you know whether the Government agencies which owned or managed or leased real estate have adopted in the communities as the commission to be paid to the local real estate realtor who may be handling the properties, the commissions which have been agreed upon as fair compensation or recognized as such in the community?

A. Well, that is the general practice.

Mr. KRAMER: Object. The question is "Did he
455 know." I wanted to wait for the answer that—

The COURT: Do you know?

The WITNESS: I do not know, sir, in detail.

By Mr. LEAHY:

Q. This Exhibit 43 which was shown you and your at-

tention was directed to page 7, that is the report of the executive vice-president. To whom does that report go?

A. It is included each quarter or three times a year in a file or in an order of business which we present to the board of directors.

Q. The national board of directors?

A. The national board of directors, yes.

Q. Is that published and sent out broadly throughout all the local boards in the country?

A. No, sir; it is included for their information.

Q. Can you answer now whether you ever sent a copy of this report to the local board here?

A. I am quite sure we did not, sir.

Q. So far as you know, you can't say now that this particular local board here in Washington ever saw or heard of that report, until just now in the courtroom?

A. I don't know.

Q. You had no interest in letting the local boards know about it, did you?

A. No, sir.

456 Q. You didn't consider it was any of the local board's business, did you?

A. No, sir.

Q. And you write here:

"Boyd T. Barnard of Philadelphia, who will continue as chairman during 1942, has endeavored throughout the past year to obtain from as many of the boards as possible information concerning prevailing schedules and contemplated changes, and this information has been assembled and catalogued."

That was an accumulation of information nationally throughout the country for the information of the National Board, wasn't it?

A. Yes, sir; and all of the statements in that report are meant to be or intended to be purely objective statements of fact. There are no opinions of anybody in there.

Q. In filing this report with your own National Board, were you engaged at that time in any combination or agreement or conspiracy to fix or raise rates here in the District of Columbia?

A. No, sir. That report is purely a factual report about certain of the affairs of the organization.

Q. And you didn't intend it to be used whatsoever for the information of any local board anywhere, did you?

A. No, sir.

457 Q. (Reading:) "As a result of the committee's activities many boards are making complete studies of their existing schedules with a view towards changing them to conform as nearly as possible with the suggested national guide."

Do you recall what national guide you referred to there?

A. The one previously published which has been introduced here in the testimony.

Mr. Leahy: Do you have the national guide here which was offered in evidence, 17-A?

(Exhibit 17-A was handed Mr. Leahy.)

Mr. Leahy:

Q. I am going to show you what has hitherto been introduced as Exhibit 17-A and ask you if you can identify it so the jury will have a complete picture of what this report is. Take a look at this photostatic copy which has been accepted as 17-A.

A. Yes, sir.

Q. That is the national guide?

A. This is the guide referred to.

Q. And what was the purpose in making up that guide upon the part of the National?

A. Mr. Leahy, purely informational, that is all.

Q. Information with reference to what?

A. Customs, rules and rates it says here.

458 Q. Customs, rules and rates throughout the country?

A. Yes, sir.

Q. Was it a guide which you had gotten up personally?

A. No, sir.

Q. Who got that up; the committee?

A. It was prepared by a committee.

Q. Was it the purpose of the guide to eliminate some of this confusion and some of the bad practices which existed, as you told Mr. Whiteford earlier?

A. Yes. The primary purpose of the guide was to stress this matter of getting uniform definitions, not charges. As I have explained, in the very nature of things, you cannot have and should not have uniformity in charges.

Q. Here in the guide and the attention of the jury was drawn to it earlier in this case, Mr. Nelson, there is a section there of suggested percentages to be charged as commissions on city property and under Section 16, let me ask you how that came to be included in the guide?

A. Mr. Leahy, I cannot answer that question.

Q. You didn't put it in there?

A. No, sir.

Q. You did not put it in there?

A. No, sir. I had nothing to do with it. I had nothing to do with either composing or printing or issuing this guide in any way, personally.

459 Q. Did you have any part in its distribution in any way?

A. No, sir, not personally.

Q. You don't know whether the local board got one or not?

A. No, sir, I have no knowledge.

Q. When you incorporated into your report the mention of the word "guide", what did you refer to?

A. This document.

Q. (Reading:) "As a result of the committee's activities many boards are making complete studies of their existing schedules with a view towards changing them to conform as nearly as possible with the suggested National Guide."

In that, as you said, the purpose was to clarify definitions and get uniformity so that the same job done would bear some relation to the compensation?

A. That is right, sir.

Q. (Reading:) "It is interesting to note that the boards which are changing their schedules are revising upwards."

What do you mean by that?

A. Well, sir, in making this report which is simply a factual report to the Board of Directors, I naturally consult with the heads of various committees, the chairman of the committees and those members of the staff

460 who have been collecting information or anything of that kind and I simply report what they say about their committee work.

Q. And did you include that in anyway with the intent in your mind that it should act to stimulate boards throughout the country to raise their rates without regard to the value of the services rendered?

A. No, sir. This report is purely objective. It is simply a report of what has happened.

Q. Did you take any action at all in any way, as executive secretary of the corporation, by any letter or anything to disseminate that information generally throughout the country to any of the local boards?

A. No, sir.

Q. Or more particularly here in the District of Columbia?

A. No, sir.

Q. I want to show you two letters. Just read them. Don't say anything about them, please, Mr. Nelson.

A. Yes, sir. I know, in general, what they are about.

Q. Could those letters or do those letters refresh your recollection now on the point asked you earlier whether or not you had received any letters indicating the acceptance of the various Government agencies of the fees fixed in the various communities?

A. Yes, sir.

461 Q. Do you know that since, for instances, 1941 or '42, in your dealings with FHA or HOLC, the rates, so-called, fixed by local boards as standard rates were agreed upon by the Government agencies to be paid?

A. Yes, sir. The local courts throughout the country, in handling real estate matters, have always regarded the custom of business as having a certain common law force and they have recognized that the customs of the business are established by the business and these local recommended schedules reflect in the minds of the courts and of the Government agencies generally the custom of the business and that is why they are accepted, not because we have adopted them or anything of the kind.

Mr. LEAHY: That is all.

Re-direct Examination.

By Mr. KRAMER:

Q. When you said that those letters helped refresh your recollection concerning the Government's interest in fees, brokers' fees, did you mean fees for selling property?

A. These letters that I was just shown had reference in one case to appraising and, in the other case, I think sales for the Alien Property Custodian.

462 Q. And appraisal as well?

A. Yes, sir.

Mr. WHITEFORD: The Alien Property Custodian, you say?

The WITNESS: Yes.

By Mr. KRAMER:

Q. Now, Mr. Nelson, you testified that this Guide, Exhibit No. 17-A, was for the purpose of obtaining uniformity in the basis of charges. Isn't that your point, rather than an identity of charges?

A. Uniformity of definitions so that people are talking

about the same thing, so that an owner and a broker are talking about the same thing.

Q. You say in Exhibit 48, the second paragraph, the last sentence:

"This can be done by seeking uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of charge."

A. Yes. May I explain the word "basis"?

Q. I wish you would.

A. Take in appraising, for instance, there has long been a conflict on what the basis of the charge should be.

In some cases appraisers have said it should be a percentage of the valuation.

The best practice today, so far as I know, is not to
463 make the appraisal fee contingent upon the valuation in any way, but rather to base the fee on the time employed and on the rating which a man puts on his own skill and what he is willing to work for.

So there you have a conflict on what we call the basis of what the charge should be.

You still find some appraisers who will appraise the property on a certain fixed percentage of the valuation.

Well, you have the same problem, I suppose, in law, and in many other businesses, that conflict, whether it should be contingent fee or whether it should be a fair fee based on competency and time employed. That is what I meant by "basis."

Q. And the purpose in sending out the Guide, you say, is not to seek to affect the amount of fees, is that it?

A. That is right. May I qualify that by saying that our function is informational and educational, and we want to make available to each board all of the information from a thousand real estate boards throughout the country, so that they may know what good practices and what different practices are.

We function like almost any other educational sort of institution. You can't say that all of the material issued by a college has no effect. It may have some effect, but its primary purpose is to let people know what the facts are.

464 Q. All I am trying to find out is the basis of charges or uniformity in definition helped by the statement on page 8 of the Government's Exhibit 17-A.

"Sales commissions and rules. All commissions shall be based on total values or sales prices of property and not on equities or partial payments."

A. That is a basis, that is right.

Q. And then you go on:

"A. City Property: Consisting of locating on land which is within or contiguous to a municipality."

A. That is a classification.

Q. That's right. "Commissions on the sale of improved or vacant property shall be not less than 5 per cent"—

A. (Interposing) That is another classification.

Q. Oh, that is a classification? If the figure had been $50,000 or $200,000—

A. (Interposing) We would have conveyed that figure if that was the figure. The classification was the thing we were after.

Q. Do you know how these figures were arrived at?

A. No, I do not.

Q. If you do we want you to tell us, you see. I thought you said you didn't know.

A. I said we would have conveyed any figure that the Committee would have given us—transmitted it.

465 Q. When you say "We," do you mean "I"?

A. I mean the office.

Mr. Kramer: No further questions, your Honor.

The Court: That is all. You may step down.

(Witness excused.)

The Court: We will recess at this time until 1:45.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m., of the same day.)

466 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to the taking of the recess.)

Mr. Kramer: If the Court please, Mr. Kelly will examine the next two witnesses.

Mr. Kelly: Call Mr. Todd, please.

Thereupon,

Leon E. Todd was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Kelly:

Q. Will you state your full name, please?

A. Leon E. Todd, T-o-d-d.

Q. Where do you reside?

A. Medford Lakes, Burlington County, New Jersey.

Q. What is your business address?

A. 2623 Westfield Avenue, Camden, and Medford Lakes, both.

Q. What is your business or occupation, Mr. Todd?

A. I am a Realtor and developer.

Q. Are you associated with some firm or do you have your own business?

A. I am president of Leon Todd, Inc., and president of Medford Lakes Company.

467 Q. How many years have you been engaged in the real estate business, Mr. Todd?

A. Approximately thirty years.

Q. Are you a member of the National Association of Real Estate Boards?

A. I am, sir.

Q. For how many years, up to August 27, 1947, were you a member?

A. Thirty years. 1947.

Q. Up until 1947.

A. Tweny-nine years.

Q. Mr. Todd, other than as a member, what positions, if any, have you held with the National Association of Real Estate Boards?

A. I have been director, vice president, and chairman of committees.

Q. Could you enumerate to us some of the committees of which you were chairman?

A. Yes, sir; chairman of the Rates, Rules and Customs Committee.

Q. In what year were you chairman of the Committee on Rates, Rules and Customs, Mr. Todd?

A. 1944 and 1945.

Q. Mr. Todd, I show you Government's Exhibit 46 for identification and ask you to look at it.

468 I will ask you whether or not you have ever seen that summary or the original thereof?

A. To the best of my knowledge I have never seen it before, unless it was shown to me at the time I was subpoenaed here, at which time I would have made the same answer.

Q. Do you of your own knowledge know who prepared it?

A. I haven't the slightest idea.

Mr. WHITEFORD: What is that?

Mr. KELLY: That was No. 46 for identification. It is two pages, Mr. Whiteford.

Mr. WHITEFORD: Oh, I remember it now.

By Mr. KELLY:

Q. Mr. Todd, you have testified that you were chairman of the Committee on Rates, Rules and Customs during the years 1944 and 1945, is that correct?

A. That is correct.

Q. Could you tell us what your duties as chairman were on that committee?

A. Well, in the handling of the committee it was a committee set aside to study and report the findings of our study to our other various Board members.

Q. And what was the nature of those studies, Mr. Todd?

A. Well, having to do with any subject that would
469 tie into our Code of Ethics, those things that would be in the interest of the public and of the broker.

Q. Was it the function of the committee, and your duties as chairman, to study rates?

A. Well, we research for rates.

Q. You search for rates?

A. Research for rates.

Q. Did you or the committee make a compilation of rates of various boards, including the Washington Real Estate Board?

A. Not during my time.

Q. Of your own knowledge do you know whether the Committee on Rates, Rules and Customs ever made a compilation of the rates of the various boards throughout the country, including the Washington Real Estate Board?

MR. WHITEFORD: You mean his committee?

Mr. KELLY: In his knowledge, Mr. Whiteford.

Mr. WHITEFORD: Of his committee?

Mr. KELLY: His own knowledge of that committee.

A. No, it would only be an inference.

470 Q. Do you know Mr. Daniel F. Sheehan, Mr. Todd?

A. I do.

Q. Will you tell us who Mr. Sheehan is?

A. Do you want to know who he is?

Q. Yes.

A. He is Mr. Sheehan.

Q. Is he a member of the National Association?

A. As far as I know he is, yes.

Q. Was he ever an officer or director of the National Association of Real Estate Boards?

A. I wouldn't know whether he was an officer or director.

Q. Do you know, Mr. Todd, whether or not Mr. Sheehan was ever chairman of the Committee on Rates, Rules and Customs of the National Association?

A. I know, I don't think he was because there were some changes of committee structure. He succeeded my particular duty but the duties were split up and the title that was given to that portion of my former duties; I don't recall its name. If I heard it, I would know it.

Q. As you understand it, Mr. Sheehan was your successor?

A. In part.

Mr. KELLY: Will you mark this Government's Exhibit?

(Letter to Daniel F. Sheehan from Leon E. Todd, dated March 20, 1946, was marked Government's Exhibit 51 for Identification.)

471 By Mr. KELLY:

Q. Mr. Todd, I show you Government Exhibit No. 51 for Identification, purporting to be a letter to Daniel F. Sheehan from Mr. Leon E. Todd and ask you whether or not you have ever seen that?

A. What was the question?

Q. I asked you whether or not you had ever seen that, the original? That, of course, is a photostatic copy.

A. It is a letter sent by me to Mr. Sheehan.

Q. Do you know whose handwriting is in the upper right-hand corner?

A. I haven't the slightest idea.

Mr. KELLY: If your Honor please, I move the admission in evidence of Government Exhibit No. 51 for Identification, the letter addressed to Daniel F. Sheehan from Leon E. Todd.

Mr. WHITEFORD: If your Honor please, it seems to me that is just multiplication of more things. I don't know what it proves. It has no evidentiary value that I can see in connection with this conspiracy, so-called.

Mr. KELLY: If your Honor please, this is a letter from the outgoing chairman of the Committee on Rates, Rules and Customs to the incoming chairman.

The COURT: I will admit it. I don't know what value it is, either, other than saying that he has forwarded his file to Miss Jones in Chicago and then stating that the

472 three major steps of the program, two of which we are not concerned with and the other step being a suggestion for a sample schedule of commissions and charges that they felt would be a good guide for the new board. I will admit it for whatever it is worth.

(The letter previously marked Government's Exhibit 51 for Identification was received in evidence.)

Mr. KELLY: That is quite true, your Honor. We merely want to show that the committee did operate in 1945.

Mr. WHITEFORD: If that is all, I will stipulate that.

Mr. KELLY: With your Honor's permission and the indulgence of you ladies and gentlemen, I would like to read it.

The COURT: Very well.

473 Mr. KELLY:

"March 20, 1946

"Realtor Daniel F. Sheehan
6401 Manchester Avenue
St. Louis, 10, Missouri.

"Dear Dan:

"Just as I was about ready to ship to you my entire file on the subject of Rates, Rules and Customs, I received a letter from Miss Jones, requesting that I forward all this data direct to her in Chicago. This I have done.

"The only file I did not forward to her was that file of personal correspondence from the committee and others direct to me. This file I am forwarding to you under separate cover.

"I am enclosing herewith the three major steps of our program last year. The first pamphlet sent out was a sample schedule of commissions and charges which we felt would be a good guide to the many new Boards being organized, and also a reminder to a lot of the older Boards to study their own schedule and revise it, if needed. The second pamphlet was a sample on arbitration procedure and this, likewise, went to every Board in the country, which certainly establishes a fine guide showing forms on how Boards should proceed under their Arbitration Committee. The third and last pamphlet was on
474 decisions rendered during a year by an Arbitration Committee.

"The above program was felt much needed in order that harmony and good feeling could existing among Board members in having a proper schedule—in having a friendly procedure to arbitrate honest differences among members of a Board—and lastly, decisions involving such cases and involving the interpretation of our Code of Ethics so that all members would know the general principles upon which our organization was founded.

"Now this has gotten considerably away from the original purpose of the committee, and apparently the way the committee has been divided this year, there are two chan-

nels of value to be developed. The original thought, as you will see from the vast correspondence and the charts sent to Miss Jones, was to bring about a study and aid Boards in getting nearer to uniform fees or, at least, in correcting some of the mistakes other Boards had made, before they fell in the same pitfall.

"Miss Jones has suggested that I forward some ideas. I am sorry I haven't much to offer other than what the files and this letter may contain, but I do suggest a follow-up of our work of last year to make sure the newer Boards, particularly, are off on the right foot. If they fail,
you know as well as I, that the Boards won't mean
475 much. If they take advantage of what we have sent
them it should help in making a stronger and better Board. Our only difficulty was making sure that that which we sent to the President of each Board actually got to the Board as a whole, rather than merely to the individual to whom it was sent. I would suggest that the National Vice-Presidents, in their meetings with various Board leaders, mention the literature sent out last year, and see that basically it is adopted.

"I know there are many other samples that could have been furnished which are better than the ones we went out, but these were the ones close at hand that could be published without cost to the National and they, at least, served as a guide.

"If I can help you further, feel free to command me.

"With personal regards, I am,

"Fraternally yours,

LEON E. TODD."

476 Q. Now, Mr. Todd, as you will notice on the second page you wrote that, "Miss Jones has suggested that I forward some ideas."

Could you tell us just what Miss Jones' suggestions were? Do you recall?

A. I said, "Miss Jones has suggested"—I don't doubt but what she did suggest that. This letter is dated March 20, 1946, and personally I don't remember Miss Jones ever suggesting that I do it.

Q. Do you happen to know Miss Jones with the National Association of Real Estate Boards?

A. Other than as an employee, I don't know her.

Q. Did Miss Jones ever work with you while you were Chairman of the Committee on Rates, Rules and Customs?

A. No. I never discussed the matter at any time during my two years of activity with her.

Mr. WHITEFORD: We can't hear you.

The WITNESS: I never discussed the matter at any time during my two years of activity with Miss Jones, as far as I know.

By Mr. KELLY:

Q. Mr. Todd, Mr. Kramer suggested that I ask you about this file which you forwarded to Miss Jones. Was that a small file or a file of great proportions?

A. Well, as to the size, I understood the file was
477. produced to Mr. Kramer.

The COURT: The file was what?

The WITNESS: The file was produced to Mr. Kramer, so he would know exactly what the size was. It was a small file.

By Mr. KELLY:

Q. I am not referring to the personal file.

A. Oh, excuse me; I thought you meant the personal file.

Q. I am referring to the file you forwarded to Mr. Jones, the file you refer to here in the first paragraph.

A. That was rather a large file.

Q. Could you give us some idea how large, Mr. Todd?

A. I would say from the standpoint of boxes it would involve around maybe 10 inches thick.

Q. Was there more than one box?

A. Yes, I think there was. I think there were a couple of file boxes. It was an accumulation that had come down from prior committees to me.

Q. I see. Then this was the file of the committee since it had first been inaugurated, is that so?

A. I wouldn't know that. It was whatever was turned over to me.

Q. When you assumed your duties?

A. When I assumed my duties, and I in turn turned
478. everything over to Mr. Sheehan as far as those duties would relate to him.

Mr. KELLY: No further questions, your Honor.

Cross Examination

By Mr. WHITEFORD:

Q. Mr. Todd, the three matters referred to in your letter, you say:

"I am enclosing herewith the three major steps of our program last year. The first pamphlet sent out was a sample schedule of commissions and charges which we felt

would be a good guide to the many new boards being organized, and also a reminder to a lot of the older boards to study their own schedule and revise it, if needed."

Will you tell me whether or not that was the schedule of your own Camden County Real Estate Board, in New Jersey?

A. It was, sir.

Q. Did it look something like this (indicating)?

A. That is it.

Q. Then did you send out also a pamphlet on arbitration procedure? You say that was your second pamphlet?

A. That is correct.

Q. Showing how the Board should proceed under an arbitration committee?

A. That is correct.

Q. That was a booklet something like that (indicating)?

479 A. That is correct.

Q. That, too, is one of your Camden, New Jersey, Boards?

A. No, that is the New Jersey Association of Real Estate Boards.

Q. That is the State Association?

A. That is correct, and at that time I happened to be Chairman of the Arbitration Committee of the State Association.

Q. The third pamphlets was on decisions rendered during the year by an Arbitration Committee. What committee was that?

A. The Arbitration Committee of the Camden County Real Estate Board, of which I happened to be Chairman that particular year.

Q. And those were decisions made in matters that came before the Arbitration Committee?

A. Of the Camden County Real Estate Board.

Q. Did any of those pamphlets have anything to do, in any way, shape, form, or fashion, with rates, fees or charges in the District of Columbia?

A. None whatever.

Q. Do you know whether any of them were even sent to the Washington Board?

480 A. That question was asked me before, and as a result of my study of the committee it would indicate that the Washington Real Estate Board was eliminated.

We had established a committee of 50 which represented one man from each one of the 48 states, together with

Canada and Honolulu. In checking over the entire list the District of Columbia is not there.

Q. You mean as a member?

A. As a member of that committee.

Q. Had no representative on that committee?

A. No.

Q. The pamphlets themselves may or may not have gone to Mr. Rush at the Washington Board?

A. I would have no way of knowing.

Q. The only way that you think they might not have gone was that the Washington Board had no member on the committee?

A. For some reason I just didn't think of the District of Columbia to include them as I did one of the States. That is the only answer I can make to it, but they are not on the list of the Committee of 50.

Q. This was entirely your own idea, was it?

A. Strictly my own.

Q. You had no official authorization of the National Association to do this?

A. I never received any authority during my entire
481 term of office.

Q. Did you notify them that you had done it? Do you remember?

A. Yes, I think they were notified, though during my two years they were sketchy years, due to the fact there was a war, and we weren't holding conventions and meetings, but I would have said the office would have known it.

Q. Let me ask you, in all of your activities, whatever they were, and apparently they were very few, from this letter, did you discuss with any person in Washington, any member of the Real Estate Board here, their rates, fees, and charges, and whether they should be lowered or raised or their boundary changed, or anything done respecting that?

A. That was never discussed with any official or any member of the Washington Real Estate Board.

Q. Either at that time or at any other time?

A. Before then or since.

Mr. WHITEFORD: That is all I wish to ask.

Mr. LEAHY: No questions, your Honor.

Mr. KELLY: Just one or two more questions, Mr. Todd.

Re-direct Examination.

By Mr. KELLY:

Q. You stated to Mr. Whiteford that you had answered the question once before about whether or not these pam-

phlets had been sent to the District of Columbia, or
482 to the Washington Board, and after your study you determined that they had not, or at least that the Washington Board was not on your list of members.

Can you tell us what that study was, Mr. Todd? What did you refer to?

A. If you will read—you have copies of the exhibits just referred to—and there is referred to a Committee of 50 and it says one from each one of the States, together with Canada and Honolulu, so I merely pulled out the Committee of 50 and I find Washington, D. C., is not among the list of the Committee of 50. That was the study I mentioned.

Q. That was in 1945?

A. 1944 and 1945.

Q. Washington was not represented?

A. That is right.

Q. In '44 or '45?

A. Yes. I followed the same procedure in '45 that I had used in 1944.

Q. You also stated you sent these pamphlets strictly as a gesture of your own, and not as an official act of the National Association; that you did notify the National Association?

Did the National Association ever ask you to recall these pamphlets?

483 A. They never asked me to send them and they never asked me to recall them.

Mr. KELLY: That is all, Mr. Todd.

Mr. WHITEFORD: That is all; thank you, Mr. Todd.

May this witness be excused?

Mr. KELLY: Yes.

The COURT: He may be excused.

(Witness excused.)

484 Mr. KELLY: Miss Jones.

Thereupon,

CARRIE MAUDE JONES *was called as a witness for the* United States and, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. KELLY:

Q. Will you state your full name, please?

A. Carrie Maude Jones.

Q. Is that "Miss"?

A. Yes.

Q. Where do you reside, Miss Jones?

A. 6847 South Park Avenue, Chicago.

Q. And do you have a business address?

A. 22 West Monroe Street, Chicago.

Q. What is your business or occupation, Miss Jones?

A. My title is Director of the Department of Information.

Q. Of—.

A. The National Association of Real Estate Boards.

Q. Do you have any other title?

A. That is all.

Q. Does the National Association of Real Estate Boards have a library?

A. That is right.

485 Q. Do you not have the title of Librarian in addition to the Director of Information?

A. We have another one who is librarian, but she works under my supervision.

Q. Miss Jones, how long have you been associated with the National Association of Real Estate Boards?

A. Since 1925.

Q. You have been continuously in their employ since that time?

A. That is right.

Q. Could you briefly outline to the Court and to the jury what your duties are or what your duties were prior to August, 1947?

A. Briefly, I should say they are the duties of any librarian to collect information, to take care of it properly, and to make it useful when it is requested by members of the Association.

Q. Has it ever been your duty to serve on any committees of the National Association?

A. I have been assigned to committees to assist them in their work.

Q. Could you tell us what committees or enumerate some of the committees to which you have been assigned?

A. With one committee I served as a staff assistant or secretary. The name of that committee is the Committee on Professional Standards. Another committee is called the Committee on Organization Analysis. I do the same type of work for that committee. I was assigned to assist the Committee on Rates, Rules and Customs at the beginning of 1946.

486

Q. Who was chairman at that time?

A. Daniel Sheehan of St. Louis.

Q. Were you ever assigned to do work with the Committee on Rates, Rules and Customs prior to that time?

A. Not officially. I gave them information when they requested it in view of my position as librarian.

Q. You stated, Miss Jones, that you have been in the employ of the National Association since 1925?

A. Yes, that is right.

Q. Do you recall of your own knowledge when the Committee on Rates, Rules and Customs was first inaugurated or set up by the National Assoeiation?

A. That was in 1936.

Q. And when the committee was first set up in 1936, did you have any official connection with the committee at that time?

A. I had no official connection until 1946.

Q. As I understand it then, 1946 was the first time you had any title or official connection with that committee?

A. That is right.

Q. Miss Jones, in your duties as director of in-
487 formation, under which I imagine you have charge of a library—

A. That is right.

Q. Did you, as part of those duties, compile the commission rates of various boards throughout the country?

A. I do if I am asked to do so.

Q. May I ask then, Miss Jones, have you ever compiled the various commission rates charged by Boards throughout the country?

A. I have never made a complete analysis. I have brought together a few times the rates from certain boards; let's say a partial compilation, a few times.

Q. Could you tell us how you go about compiling rates of various boards? What are the mechanics?

A. Well, in one compilation which, I believe, was the last one that was made, I set up a book in which I entered the schedules of different boards. It was arranged by States, then by cities; and there was just a running account of the different schedules. It was impossible to do anything except put them together in book form.

Q. Was the District of Columbia included in that compilation?

A. That is right.

Q. And in what year was that compilation made?

A. I will have to make a guess on that. I would say about ten years ago.

488 Q. That would be 1938?

A. 1938.

Q. Miss Jones, I show you Government's Exhibit No. 46 for Identification and ask you to look at it. Have you ever seen this before, Miss Jones?

A. I don't remember that I have.

Q. Do you know of your own knowledge who prepared that?

A. No, I do not. There is no identification on it at all.

Mr. KELLY: Excuse me just for a moment, please, your Honor.

The COURT: Were you with any of the State Boards, Miss Jones, before you went to work in Chicago with the National Association?

The WITNESS: No, sir.

The COURT: Who were you associated with before you went with the National Association?

The WITNESS: I was in the library of the University of Idaho at Moscow.

The COURT: And before that?

The WITNESS: I was in the library of the Minneapolis Public Library.

The COURT: You had not previously been associated with any real estate business?

The WITNESS: I had not.

489 By Mr. KELLY:

Q. Miss Jones, these compilations that have been prepared on the rates and charges and commissions, do I understand they are available in your library?

A. Yes; to members of the Association or to members of the general public if they wish to see them.

Mr. WHITEFORD: I can't quite hear you.

The COURT: She said they were available to members of the Association and to the general public.

By Mr. KELLY:

Q. Were you authorized, Miss Jones, by the National Association to make the compilations available to members of the Association and to any other person who might be authorized to see them?

A. It is my duty to give out information, as I understand the orders which I receive from my boss.

Q. Miss Jones, did you ever make this compilation available to publishers of the Real Estate Journal?

A. No.

Q. Was the compilation furnished to the publishers of the Real Estate Journal?

A. No.

Q. It was never furnished to the publishers by or through your library?

A. No.

490 Q. Did you, Miss Jones, ever inspect or correct any galley proof of the publication of the Roster Number before that was finally published in the Real Estate Journal?

A. No.

Q. During the year 1946 you have testified, Miss Jones, that you were associated with the Committee on Rates, Rules and Customs as the staff or assistant secretary; is that right?

A. The staff assistant.

Q. Were you familiar with the purposes of that committee?

A. I didn't serve long enough to be.

Q. Before your service, had you any knowledge at that time what the purposes of that committee were?

A. Not specifically.

Q. Miss Jones, do you, of your own knowledge, know why the Committee on Rates, Rules and Customs, of which you were the staff assistant, didn't function in 1946?

A. No; I don't know why it didn't function.

Q. A file has been referred to by a previous witness, Miss Jones, a file which he sent to you containing the documents on the work of the Committee on Rates, Rules and Customs. Could you tell me where that file is?

A. Part of it might be in your hands because one of your men came to our office and took whatever material he wanted.

491 Q. Miss Jones, I show you Government's Exhibit 51 in evidence and I would like you to look at the first paragraph. Does that refresh your recollection as to the receipt of that file, Miss Jones?

A. That is right.

Mr. KELLY: Does counsel have that file which has been referred to?

Mr. WHITEFORD: I gave the file to Mr. Kramer yesterday.

Mr. KELLY: Not this file.

Mr. WHITEFORD: I did. I gave Mr. Kramer the file he asked for. If you wanted another one, why didn't you say so? That is not the way to get it, that I know of. You

asked me for the file and I gave it to you yesterday or when Mr. Sheehan was here, the file that you asked for which is referred to in the second paragraph of this letter. (Reading:)

"The only thing that I didn't forward to her was the file of personal correspondence from the Committee and others direct to me. This file I am forwarding to you under separate cover."'

You asked me to get that file and you wrote a letter to Mr. Sheehan in St. Louis two weeks ago and asked him to bring it with him. He didn't have it. I got it and gave it to you yesterday morning.

Mr. KRAMER: That is correct, your Honor.

Mr. WHITEFORD: Then why make all the mystery about it?

Mr. KRAMER: We were talking about the file
492 referred to in the first paragraph of the letter.

Mr. WHITEFORD: You didn't ask for that. I don't want any suggestion made here that you have asked for something that you did not get.

Mr. KELLY: I don't think that is necessary.

Mr. WHITEFORD: That is the inference. You knew I gave the file to Mr. Kramer yesterday.

The COURT: Mr. Whiteford, you are talking about the file sent to Miss Jones, the one that was not forwarded to Mr. Sheehan?

Mr. WHITEFORD: That is right.

The COURT: You are talking about the personal file?

Mr. WHITEFORD: Where is the letter that you sent to Mr. Sheehan? I told you I would get the file for you and I gave it to you.

Mr. KRAMER: You gave me a file.

The COURT: There are two files in the case.

Mr. WHITEFORD: But nobody has asked about that. That is a lot of material. If you want that, we will try to go out to Chicago and dig it up if it is still there. We will dig up anything you want but I don't want any uncertainty about just what was asked for and what has been furnished.

Mr. KELLY: That is all, Miss Jones.

493 Cross Examination.

By Mr. WHITEFORD:

Q. I wasn't quite clear, Miss Jones—though it doesn't make much difference—but you don't wish us to infer that you were a member of this committee or had any part in its deliberations or recommendations. You simply made notes of whatever you were told to make notes of, isn't that right?

A. That is right.
Q. That is all?
A. That is right.
Q. It was a clerical job for the committee?
A. That is right.
Mr. WHITEFORD: That is all.
Mr. KELLY: Just one more question, please.
Miss Jones, in addition to making notes and acting in a clerical capacity, did you also do any research for the committee?
The WITNESS: Well, I would say that I furnished information. I answered that question. If that took a little digging, if you wish to define research that way, then I did that but I furnished what information they wanted.
Mr. KELLY: Thank you.
The COURT: That is all.
Mr. WHITEFORD: May Miss Jones be excused after her long and arduous testimony, to catch the 4:30 train?
494 Mr. KRAMER: Yes. We hope you will go back and look for the file.
Mr. WHITEFORD: All right.
(Witness excused.)
495 MALETZ: Call Mr. Beitzell, please.

Thereupon,

JOHN GARRETT BEITZELL was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. MALETZ:
Q. State your full name, please.
A. John Garrett Beitzell.
Q. Where do you live?
A. Fairhaven, Maryland.
Q. What is your business, sir?
A. Real estate business; Realtor.
Q. Is your business incorporated?
A. No, sir.
Q. You own your own business?
A. Yes, sir.
Q. Approximately how long have you owned your own business?
A. Approximately fifteen years.
Q. Do you employ any persons?
A. I do.

Q. About how many?

A. I have approximately fifteen in the organization.

Q. How many salesmen are employed by your business?

496 A. Approximately twelve.

Q. Are they all licensed salesmen?

A. All licensed.

Q. Mr. Beitzell, are you a member of the National Association of Real Estate Boards?

A. I am.

Q. And for how long have you been a member?

A. I would say, as a guess, I don't know, approximately fifteen years. I have been a member of the National as long as I have been a member of the Washington.

Q. Are you a member of the Washington Real Estate Board?

A. I am, sir.

Q. For how long have you been a member of the Washington Real Estate Board?

A. Approximately fifteen years.

Q. Mr. Beitzell, have you ever been an officer or director of the National Association?

A. No; sir.

Q. Have you ever been an officer or director of the Washington Board?

A. I have been a director of the Washington several times, and I am now an officer of the Washington.

Q. What is your office?

A. Second Vice President.

497 Q. In what years were you a director of the Washington Board, to the best of your recollection?

A. I don't know; it would be a guess pure and simple; I don't know.

Q. Mr. Beitzell, I show you Government's Exhibit 4, which is a list of the officers and directors of the Washington Board, and ask you whether this exhibit refreshes your recollection?

A. It does. I see my name there in '41 and '42; '42 and '43; '46 and '47.

Q. Mr. Beitzell, I show you Government's Exhibit 7, a copy of the constitution and by-laws of the National Association, and ask you to examine that document.

A. This is a copy of it.

Q. Have you ever seen this document before?

A. I have.

Q. Have you ever read it?
A. Yes, sir.
Q. Have you read the document before August 27, 1947?
A. Yes, sir.
Q. Are you generally familiar with its contents?
A. Generally.
Q. Mr. Beitzell, I show you Government's Exhibit 6, the Code of Ethics of the National Association of Real Estate Boards, and ask you to examine the document.
498 A. Yes, sir.
Q. Have you ever seen this document before?
A. I have.
Q. Mr. Beitzell, do you have a copy of this Code of Ethics in your office?
A. I think I have, sir.
Q. Are you familiar with the provisions of this Code of Ethics of the National Association?
A. Generally I am, yes, sir.
Q. Mr. Beitzell, I show you Government's Exhibit 3, a photostatic copy of the constitution and by-laws of the Washington Board, and ask you to examine that.
A. Yes, sir.
Q. Have you read this document before?
A. I have.
Q. Are you familiar with its provisions?
A. I am.
Q. I call your attention to the inside cover of the document, the constitution and by-laws of the Washington Board, and read:
"A Relator is a 'person engaged in the real estate business who is a board member or an individual member of the National Association of Real Estate Boards, is subject to its rules and regulations, observes its standards
499 of conduct, and is entitled to its benefits.' Realtor is so defined in the Association's Constitution, Article 2, Section 5. The Association diligently promotes its proper use as a safeguard for the public in dealing with real estate agents.
"The term Realtor is not a synonym for 'real estate agent.' It is the distinctive and exclusive designation for those within the membership of the National Association. The term definitely connotes business competence and high standards of business conduct. Every Realtor has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association, and adopted by

his own Board to govern real estate practices of members of the Board, and has manifested that he is of good business character and that he is capable of properly caring for real estate matters entrusted to him."

Mr. Beitzell, are you familiar with that provision?

A. Yes, sir.

Q. You have examined that provision before?

A. Yes, sir.

Q. Mr. Beitzell, I show you Government's Exhibit 17-A, the Guide on Rates, Rules and Customs, and ask you to examine that document.

A. I recognize this.

Q. Have you ever seen this document before?

500 A. I have.

Q. Prior to August 27, 1947?

A. I am positive I have, yes.

Q. Do you recall the date when you saw that document?

A. No, I do not; I don't remember, sir.

Q. Do you recall whether you had a copy of the document in your office?

A. I couldn't state definitely that I have. I have had at different times, I think, all the publications of the Washington Real Estate Board, and all that Washington has given me from National. At some time or other I am positive I have had it.

Q. Do you recall whether Mr. Rush furnished you a copy of this Guide?

A. I don't recall.

Q. Mr. Beitzell, do you recall attending a meeting of the Board of Directors in 1943, which was concerned with the revision of the standard rate of commissions?

A. I do.

Q. Will you tell us in your own words what transpired at that meeting?

A. The substance of the meeting was that the question was coming up about revising the rate of commissions from 5 per cent up to $5,000 and 3 per cent above that, in the downtown area, to a straight 5, and to eliminate the

501 boundary line that had been causing so much trouble on the commission rates.

The COURT: Straight 5 regardless? No limits?

The WITNESS: No, it was to be changed from a straight 5 up to $50,000 and 3 per cent above $50,000.

By Mr. MALETZ:

Q. Is that all that transpired at that meeting?

A. There may have been more, but I don't remember. That was what the meeting was called for.

Q. That was the important business of that meeting?

A. That was the important business of that meeting.

Q. Do you understand, Mr. Beitzell, that I am speaking of a meeting of the Board of Directors of the Washington Board, and not the special meeting of the members of the Washington Board?

A. Possibly I am speaking of the members of the Washington Board; that is what I possibly had in mind.

Q. Let's go back and see if you can recall a meeting of the Board of Directors of the Washington Board in approximately January, 1943? Do you recall such a meeting?

A. No, I don't.

Q. I show you, Mr. Beitzell, Government's Exhibit No. 18, and ask you to examine this document. Take your time, Mr. Beitzell.

A. First I was trying to find out if I was supposed
502 to have been present. If I wasn't I wouldn't know anything about the meeting, and I don't see that my name appears—oh, yes, I do, the last one.

The COURT: Turn over to the last paragraph of the second page, Mr. Beitzell.

The WITNESS: All right, sir. Yes, sir, I remember it.

By Mr. MALETZ:

Q. Can you tell us now what transpired at the meeting of the Board of Directors of the Washington Board, in your own words, sir?

A. Well, according to the last paragraph we discussed the changing of the present, at that time present, rate of commission from 5 per cent up to $5,000, and 3 per cent above—

The COURT: Do you have any independent recollection, without referring to that?

The WITNESS: Generally speaking, yes, sir, I do. I remember it in a general way.

I have never had anybody to refresh my memory on it since that time, but I do remember in a general way what transpired, and that paragraph just shown to me there is the substance of it.

By Mr. MALETZ:

Q. Do you recall attending a special meeting of the members of the Washington Board in the Empire room
503 at the Hotel Ambassador in 1943?

A. I do, sir.

Q. Can you tell us in your own words what transpired at that meeting?

A. As near as I remember, the commission rates at that time were discussed in an open meeting; whether it was advisable to change or not, and it was put up to the body of the general meeting, and they voted for the change.

Q. And the members of the Washington Board—

A. The members of the Washington Board, those who were present, voted in favor of the change.

Q. They agreed then, did they, that the standard rates of commission on the sale of real estate in the District was to be 5 per cent on the first $50,000 and 3 per cent on the excess; is that correct?

A. That is correct; to the best of my knowledge.

Q. Mr. Beitzell, you said that this was an open meeting. Were members of the public present at that meeting?

A. I don't know, sir. I know that members of the Board were invited. Whether there was anyone else present, other than members of the Board, I don't know.

Q. Mr. Beitzell, did you regard the action taken at the special meeting of the members of the Washington Board as important to your business?

A. I did.

504 Q. Would you tell us why that action was important to your business?

A. Yes, it was important for two reasons.

In my particular business the boundary line was a decided item. I was operating up in the Petworth section, where at that time Decatur Street was the boundary line, and there were certain houses south of Decatur Street and certain houses north of Decatur Street, and the question always was coming up as to how much commission should be paid on them, and the people on one side of Decatur Street didn't see why they should pay more than people on the other side of Decatur Street. So I was mighty anxious to get that part of the thing eliminated.

But the amount of commission was another item that was important to my business.

I was naturally trying to get a little higher commission than we were getting, because at that time it was right hard to make a living, paying advertising, and everything else, on the commissions we were getting, and I think we deserved an increase.

Q. Mr. Beitzell, couldn't you charge whatever you wanted?

A. As a matter of fact, possibly we could have charged as much as we wanted, but the customary charge throughout Washington by all brokers, most all brokers, was
505 5 per cent up to $5,000 and 3 per cent above that.

Q. You said you wanted to make some more money in the brokerage business. Why didn't your charge a higher rate of commission before the members of the Board acted?

A. We followed the general pattern of the charges by all brokers, and that general pattern was the 5 per cent up to $5,000 and 3 per cent above it.

Q. Mr. Beitzell, you mentioned that there has been some confusion between the boundary zones.

Have you ever seen this map, Government's Exhibit No. 13, before?

A. Yes.

Q. I take it the people who owned property close to the boundary line were the persons concerned with that confusion, is that correct?

A. Well, there was more confusion by the people who were immediately on or close to the boundary line, yes.

Q. If a rate of 5 per cent on the first $5,000 had been adopted for the entire district, would not that have eliminated the confusion?

A. That would have eliminated that part of the confusion, yes, as far as that goes.

It would eliminate the confusion had there been no boundary line, then there wouldn't have been any boundary confusion.

506 Q. If the rate had been 5 per cent on the first $5,000 for the entire District there would have been no confusion of any kind?

A. There would have been none so far as boundary lines.

Q. What confusion would there have been, then, forgetting the boundary lines?

A. Possibly none, so far as confusion was concerned.

Q. Mr. Beitzell, for how many years have you been in the real estate business in the District of Columbia?

A. Since 1919.

Q. I take it, then, that you are an expert in that business? I know that you are inclined to be modest.

A. I know the business, if that's what you mean, sir.

Q. You are familiar, then, with market trends in real estate?

A. Yes, sir.

Q. Would you say, Mr. Beitzell, that the price of real estate has increased in the District from 1940 to 1947?

A. Yes, I would say so, sir.

Q. Does your firm specialize in any aspect of the brokerage business?

A. We specialize in brokerage in the sale of houses mostly.

Q. The sale of houses?

A. Yes.

507 Q. Are the majority of houses which your firm sells sold for less than $50,000?

A. Oh, yes.

Q. Mr. Beitzell, would you examine this map again? I have been living in the District since 1939, but I confess I am not too familiar with it.

Are you familiar with Upshur Street?

A. Yes, sir.

Q. Northwest?

A. Yes, sir.

Q. The block between Fifteen and Sixteenth Streets?

A. Yes, sir.

Q. As I recall—I drove through there—there are row houses on that street; is that correct?

A. Between Fifteenth and Sixteenth there are row houses, yes, sir.

Q. In 1940 what was the selling price for a house on Upshur?

A. Well, there were two classes of houses. Preston built on one side of the street and Shapiro built on the other side of the street. The one on the north in 1940 would possibly have sold for around $16,000 or $17,000; the south side larger, a thousand dollars or a little less.

Q. At the end of 1946 what was the selling price for that house—what would the selling price for that house

508 have been?

A. Possibly $1,500 or $2,000 higher.

Q. You say the price would have increased about $2,000 in the six years?

A. Approximately.

Q. Mr. Beitzell, did you notice that on certain types of houses the price went from about $10,000 to $16,000 or $17,000 in that period of time?

A. Yes, I did notice it.

Mr. Maletz: May I use this blackboard, if your Honor please?

The Court: Yes.

By Mr. MALETZ:

Q. Can you see this blackboard?

A. Yes, sir.

Q. Mr. Beitzell, we have a house selling in 1940 for $10,000.

The COURT: Where is it located?

By Mr. MALETZ:

Q. Let's say it is located on Upshur Street. What would the standard rate of commission have been?

A. On Upshur Street it would have been the 5 per cent. I think Decatur Street at that time, I believe, was the boundary line.

509 Q. Let's take a piece of property in the so-called city area.

A. The 5 and 3 zone. The commission on $10,000 would have been $400.

Q. It would be 5 per cent on the first $5,000 which is $250, plus 3 per cent on the excess of $5,000. You are correct, Mr. Beitzell.

A. I have figured it a lot of times.

Q. The commission would have been $400?

A. 5 per cent would have been $500.

Q. Mr. Beitzell, after 1943 when the commission was 5 per cent straight, the commission on this piece of property would have been $500?

A. That is right.

Q. Is that correct, sir?

A. That is right.

Q. Mr. Beitzell, we will assume that this house has gone up to $18,000. Is that all right?

A. Yes.

The COURT: A $10,000 house on Upshur Street?

The WITNESS: No, not on Upshur Street it wouldn't. There are some cases it might have gone but on Upshur Street, I don't think it would have gone that high on Upshur Street.

Mr. LEAHY: Isn't this all just a lot of arithmetic? I don't know whether Mr. Maletz wants to show that

510 he is good in arithmetic.

Mr. MALETZ: I am not. I want to just point out to the jury the change of the commission rates.

Mr. LEAHY: Will you show the effect over $50,000?

Mr. MALETZ: I will be glad to.

Mr. LEAHY: We would be glad to have you do that.

By Mr. MALETZ:

Q. Shall we call this $17,000?

A. You can call that $15,500 or $16,000; I think $15,500.

Q. Let's call it $15,000.

A. All right.

Q. Under the old rates the commission would have been 5 per cent on the first $5,000—

A. $550.

Q. $250?

A. $550.

Q. And after 1943, the commission would be $750, is that correct?

A. That is right.

Q. Mr. Beitzell, if the Commission rate had not been changed in 1943, the commission the broker would have received would be $550 rather than the previous $400, is that correct?

A. Yes.

Q. In other words, as property goes up the rate of
511 commission of the broker remaining constant, the net return the broker receives would increase?

A. That is right.

Q. Under the changed rates, this piece of property which has increased in value from $10,000 to $15,000 would return the broker a commission of $750, is that correct?

A. That is right.

Q. In other words, the broker, before 1943, would have received $400 commission, is that correct?

A. That is right.

Q. And after 1943, he would receive $750 commission. Is that correct, sir?

A. That is right.

Q. Mr. Beitzell, how many apartment houses have you sold in 1946?

A. Very few.

Q. Can you state how many?

A. I haven't sold any of the large ones up to $50,000 if you are trying to bring that out.

Q. Yes.

A. No, I have sold none.

Q. I will leave that examination to Mr. Leahy in cross. While Mr. Kramer is getting an exhibit, I want to refer Mr. Beitzell's attention to this matter.

Mr. Beitzell, you are familiar with this map, aren't you?

512 A. Yes.

Q. Is there a considerable amount of residential property in this so-called city area?

A. Yes, sir, there is a lot; more per acre than any place else in the city.

Q. More per acre than any place else in the city?

A. Yes. They are practically all row houses in that section while, in the other sections, you have detached houses.

Q. Is there considerable activity in this city area?

A. Possibly not as much at the present time as there has been in the outlying areas.

Q. Had there been, between the end of 1945 and the end of 1946, considerable activity in the so-called city area?

A. Not as much, no. During that length of time, most of the houses sold were the newer houses and it was right difficult to get a used house or a house in that section for sale.

Q. Mr. Beitzell, I show you Government Exhibit 26, a standard form of sales contract issued by the Washington Board. Would you examine it?

A. Yes, sir.

Q. Mr. Beitzell, did your firm use a similar type sales contract?

A. At one time, yes, sir.

The COURT: I didn't get the answer.

513 The WITNESS: At one time, yes, sir.

By Mr. MALETZ:

Q. Did your firm use a similar form of sales contract prior to August 27, 1947?

A. Sometime in 1947, the early part of 1947, I had new contracts made that eliminated the feature of fixed commission that you have in mind.

Q. Do you recall the date when you eliminated that provision?

A. I don't recall the exact date. I don't know what the exact date is.

Q. From 1941, to that unknown date in 1947, did you first use a similar type of sales contract?

A. A similar type of sales contract, yes.

Q. I call your attention, Mr. Beitzell, to paragraph 16 of this contract which reads:

"The seller agrees to pay to.....agent, the regular rate of commission fixed by the Washington Real Estate Board, the amount of which said commission being hereby assigned to the agent by the seller out of the proceeds of the sale."

Did the contract used by your firm prior to this unknown date in 1947 contain this provision?

A. It did.

Mr. MALETZ: I have no further questions.

514 Cross-Examination.

By Mr. LEAHY:

Q. Let's go to last things first, Mr. Beitzell. You just looked over this standard form contract, didn't you?

A. Yes, sir, I did.

Q. And your attention was directed to the fact that the seller agrees to pay to blank agent the regular rate of commission fixed by the Washington Real Estate Board. You said you had used the standard form for some years. Is that right?

A. That is right, yes, sir.

Q. And in 1947, you got up your own contract?

A. That is right.

Q. Do you think you were violating the ethics when you did it?

A. No, sir.

Q. Is it known to the Washington Board you are using your own form of contract?

A. Yes, sir.

Q. Have you ever been hauled on the carpet for it?

A. Never.

Q. Have you ever been disciplined for it?

A. Never.

Q. Have you ever been asked to change back to the old form?

515 A. No, sir.

Q. Were you asked to use this form?

A. No.

Q. You used it because it contained most of the understandings which you would make between the seller and the purchaser, is that correct?

A. That is right.

Q. Do you notice the words "The seller agrees to pay," do you notice that?

A. I notice it, sir.

Q. Is it a fact that every commission which you negotiated with your purchaser or with your seller, whichever one you may happen to be representing, was the subject of an agreement between you two?

A. Always.

Q. You never considered yourself to be bound by the ethics to pay them so much or else, did you?

A. No, sir.

Q. That was your general practice, wasn't it?

A. We discussed every deal; every deal stood on its own. We discussed what the man would have to pay. He would

want to know how much net he would get so he was thoroughly familiar with the contract.

Q. And having all those things explained to him, he was willing to pay you what he thought was a fair and
516 reasonable commission?

A. Yes, sir.

Q. Sometimes it was 5 and sometimes it was not?

A. That is true.

Q. Sometimes 5 and 3 and sometimes it was not, isn't that right?

A. That is right.

Q. If a man, for some reason, felt he was losing on a piece of property, I don't care whether it was in this area, the central city area or outside, you adjusted the commissions to meet whatever the conditions were?

A. Definitely.

Q. That was known to the Washington Board?

A. I wouldn't have objected if it had been known to the Board. I don't think I discussed it with every member—

Mr. MALETZ: Objection.

By Mr. LEAHY:

Q. You were a director of the board, weren't you?

A. Yes, sir.

Q. You were a director, I think your attention was called to the fact, in 1941, '42, '43, again in '45 and '46?

A. I have made statements at directors' meetings lots of times that I had to take less than the regular commission that is usually set up by all brokers.

Mr. MALETZ: Your Honor, I object. May we ap-
517 proach the bench?

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. MALETZ: If your Honor please, we are not reluctant to go into the question of adherence. It has been our position that the agreement to fix prices is what is illegal under Section 3 of the Sherman Act.

Mr. Leahy has begun a cross-examination of the witness and gone into that question of adherence. I will say this: If your Honor desires to go into the question, it would be necessary for us, and we are prepared to do it, to have all the members of the Washington Real Estate Board testify.

The COURT: All 250?

Mr. MALETZ: Yes.

The COURT: I am not going to listen to 250 so forget about that.

Mr. MALETZ: If your Honor please, we are prepared to submit legal memoranda or briefs.

The COURT: I have already read two of them. You are not going to present another one, are you?

Mr. MALETZ: Might I call to your Honor's attention the Trenton Pottery case where the Supreme Court held that evidence with respect to adherence to the agreed upon prices was immaterial?

The COURT: I understand. You can argue that
518 when the proper time comes. All he asked of the witness when he was conducting his examination was what his practice was.

Mr. KRAMER: I take it you overrule the objection to this testimony?

The COURT: I can see no harm in the question because I recognize the fact that it is a regular agreement. Whether they live up to it or not, is immaterial.

Mr. MALETZ: Thank you, your Honor.

(Thereupon, counsel resumed their places at the counsel table, and the following proceedings were had in the hearing of the jury:)

By Mr. LEAHY:

Q. Mr. Beitzell, I think that you had just stated that, as a director, you had talked to other members of the Board of Directors also and advised them that you negotiated your commissions for less than the so-called standard?

A. Yes; that was discussed many times. In fact, I don't think there was any one of them who hadn't done it at one time or another. That was common knowledge among the board.

Q. That was common knowledge amongst the board that you negotiated the rate of commission that would be paid in each individual case by each individual purchaser or seller, according to which one you represented?

A. Definitely.

519 Q. And have you, as a director in '41, '42, '43, '45 and '46 ever known of any member of the Washington Board ever having been called to account by way of disciplinary action or by suspension or expulsion or anything else?

A. Not once.

Q. You said you had about 15 in your organization?

A. Yes, sir.

Q. How many salesmen have you?

A. About 12.

Q. Are all of those salesmen associate members of the local board?

A. With the exception of one or two of the most recent ones that have just come in.

Q. And it is perfectly admissible under the rules and regulations of the local board to have salesmen in your office who are not members of the board?

A. Yes; it is not compulsory at all.

Q. Do you know whether it is the practice among your salesmen too to negotiate these individual contracts with each individual purchaser or each individual seller and agree on whatever commission is fair and reasonable?

A. Oh, yes; definitely.

Q. And you know that to be the practice, generally, in other boards?

A. I do.

520 Q. In other words, Mr. Beitzell, you have been a member of this local board, as I understand, for some 15 years.

A. That is right.

Q. And isn't it a fact that this so-called standard rate which we hear talked about is the standard rate which was agreed upon among you and when I say among you, I mean the members of the local Washington Board and the Board of Directors; that was the recommended rate generally admitted by custom and the courts to be the fair standard of compensation in the ordinary everyday usual real estate transaction?

A. That is right.

Q. Just as you use a yardstick to measure a piece of cloth, didn't your Board adopt that as a standard so the public might know how the value of your services might be rendered in the ordinary usual everyday transaction?

A. Yes, sir.

Q. But they left it to every individual member to arrange his own commissions in each individual case?

A. It was done in each individual case, yes, sir.

Q. So that this meeting, to which your attention was attracted, of the Board in January, 1943, and of the special meeting of the membership in February, 1943, it never undertook to fix commissions in individual cases for individual brokers, did it?

A. Never.

521 Q. And it was never recognized among the membership, was it, that it had so done?

A. No, sir, at no time.

Q. And you didn't construe the ethics of your association to be such that you were restricted in that right to negotiate your own commissions as the business demanded?

A. No, sir.

Q. Which is $2,500, and then he would bet $1,500, which would be $4,000, or a loss of $1,000?

A. Yes.

Q. If you make that $200,000, he has lost another thousand, has he?

A. That is right.

Q. When you come to the larger apartment houses that sell for $500,000, or more, he gets 5 per cent on the first $50,000 still, doesn't he?

A. That is right.

Q. So he gets $2,500 and he gets only 3 per cent on $450,000, doesn't he?

A. That is right.

Q. Or $1,350. Is that right now?

A. That is right.

Q. I have made a mistake somewhere but I don't know where. Would it have been $25,000?

A. That is right.

Q. So he would get $16,000 instead of $25,000, wouldn't he?

A. That is right.

Q. And I take it you haven't any knowledge of the
524 loss due in commissions on those higher priced homes?

A. It wouldn't affect my office at all.

Q. Your office deals in the smaller projects?

A. That is right.

Q. For instance, did your office deal in some of these veteran housing projects?

A. We have sold a few of them; not as many as we would like to have sold because it was right difficult to have them approved at the appraised value so that the veteran could buy them, but we have sold some.

Q. And in those in particular, do you make special commission agreements?

A. I have sold them for $50 a deal; yes, very special.

Q. As low as $50?

A. Yes.

Q. Was there ever any complaint from the local real estate board on it?

A. No, sir.

Q. Or the National?

A. No, sir.

525 Q. I will ask you if to your own knowledge it isn't a fact that in large veterans' housing projects, where a single builder is building say 50 or 60 or 100 houses, isn't

it the frequent occurrence that he is given a commission, an overall commission, of so much on each one of the houses?

Mr. KRAMER: Objection, your Honor.

Mr. LEAHY: That is within the District of Columbia and the jurisdiction of the local board.

Mr. KRAMER: Is that within your knowledge, Mr. Beitzell?

The WITNESS: Yes, it is; I know very well what they have been paying.

By Mr. LEAHY:

Q. Tell us about it.

Mr. KRAMER: Tell us about how you know.

A. Well, in cases where a builder builds a lot of houses to sell to the GI's there have been cases where I know the houses have been taken on a $50 straight fee for the sale of those houses to the GI's.

By Mr. LEAHY:

Q. And that is by members of our local board?

A. Yes, sir; oh, yes.

Q. That isn't something unusual?

A. Not unusual at all; that is not anything unusual.

Q. So that in your entire experience of 15 years as a member of the local board, have you at any time ever
526 found that the interpretation of the ethics was to the effect that they fixed commissions, in effect that they fixed your commission which you were negotiating with your purchaser or with your seller at any individual time?

A. I have never heard that question come up the whole time I have belonged to the board; not one time.

Q. And the practice among the members has been to the contrary, hasn't it?

A. It has, definitely.

Q. You were shown, as you recall, the constitution of the National?

A. Yes, sir.

Q. You read that over?

A. Yes, sir.

Q. And you read the ethics of the National?

A. Yes, sir.

Q. And you saw in the constitution of the National the provision that you were supposed to live by and abide by and conduct your affairs as a realtor in accordance with that constitution and with those ethics, isn't that true?

A. That is right.

Q. Did you know there were 38?

A. I don't know it.

Q. And wasn't the elimination of that boundary line which caused confusion not only among your brokers but also with the public, because of complaints of the public?

A. It caused a lot of complaint.

Q. Did you intend, when you were a director and discussing the elimination of that boundary and fixing a standard which you thought was fair and reasonable all over the City of Washington, intend in any way to re-
529 strain trade and commerce in real estate in the District of Columbia?

A. That thought never entered my head.

Q. Did you at any time ever have any connection whatsoever by way of correspondence or telephone or conversation with the National Board or any of its directors or officers with reference to that?

A. No, sir.

Q. Did you know of any other one of the directors on the board, while you were sitting there and discussing it, who did have?

A. No, sir.

Q. Did you ever hear any one of them saying it was their purpose and intent to restrain or increase the rate of commissions in the District of Columbia?

A. No, sir.

Q. It has just been suggested that perhaps I should ask you the question to bring out the information for the benefit of the jury:

Where a GI house would be for sale, with $50 commission, what would the selling price be to the GI?

A. Oh, seven or eight thousand dollars, six thousand, whatever they might have been built for at that time.

Q. That would be in the 5 percent zone?

A. That would be in the 5 percent zone.

Q. Instead of getting $350 then you would take $50?
530 A. That is right.

Q. You are acquainted generally with other brokers in the District of Columbia, aren't you?

A. Yes.

Q. And you know there are about 3,000 or 3,500 who are not members of your board?

A. Yes, sir.

Mr. KRAMER: Is that brokers?

Mr. LEAHY: Licensed by the license commission, including salesmen and brokers.

A. Yes.

By Mr. LEAHY:

Q. You have about 450 in your organization against 3,500 outside, is that true?

A. That is right.

Q. Do you know what rate or standard commission those outside your board have adopted in the District, or followed?

A. The majority of them—

Mr. KRAMER: Objection, your Honor. The witness was asked whether he knows.

By Mr. LEAHY:

Q. Do you know of your own personal knowledge?

Mr. KRAMER: Do you know?

The COURT: Do you know of your own personal knowledge?

A. I know of my personal knowledge that the ones
531 I know follow the regular commission rate that we follow.

By Mr. LEAHY:

Q. And why is that, do you know?

A. It has been considered a fair rate of compensation for your efforts.

Q. By whom?

A. By the general public, the courts, and everyone else.

Q. And that is why everybody follows it, isn't it?

A. That is why everybody follows it.

Q. And it isn't because there is anything in the Code of Ethics, is it?

A. Not to my knowledge.

Mr. LEAHY: That is all.

Mr. WHITEFORD: I have no questions.

Re-direct Examination.

By Mr. MALETZ:

Q. Mr. Beitzell, Mr. Leahy asked you whether you knew if the rates of the Washington Real Estate Board were considered to be fair and reasonable by the courts, and I believe you answered that to the best of your knowledge the courts had so considered them.

Are you familiar, Mr. Beitzell, with the District of Columbia Court of Appeals case of Hecht vs. Whiteford?

A. I am not.

Q. Did you know that the Court of Appeals in a
532 decision in that case stated—

Mr. LEAHY: I object.

The COURT: Sustained.

By Mr. Maletz:

Q. Now, Mr. Beitzell, you testified on direct examination that you wanted a raise in commissions because of the increased cost of doing business; is that correct?

A. That is right, sir.

Q. You further testified, I believe, that you didn't proceed on your own to raise your commission rates prior to the action by the Washington Real Estate Board; is that correct?

A. That is correct.

Q. Did you or did you not state that the schedule of commissions of the Washington Board was the general rule for members of the Washington Board?

A. I did.

Q. You followed that general rule, is that correct?

A. I attempted to follow the general rule. There are many times when I have made exceptions in the rules, many times.

Q. But as a general rule you followed it, is that correct?

A. As a general rule I did.

Mr. Maletz: No further questions, your Honor.

(Witness excused.)

533 The Court: We will take our recess until half past 10 tomorrow morning.

(Thereupon, at 3:30 o'clock p. m., the trial was recessed until 10:30 a. m., the following day, Friday, May 28, 1948.)

534 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950-47

United States of America
plaintiff,
vs.
National Association of Real Estate Boards and
Washington Real Estate Board,
defendants.

Washington, D. C.,
Friday, May 28, 1948.

The above-entitled action came on for further trial before the Honorable Edward M. Curran, Associate Justice and a Jury, at 10:00 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor J. Kramer, Trial Attorney.

Joseph P. Kelly, Jr.
Herbert N. Maletz,
C. Heyward Belser,
Attorneys, Department of Justice.

535 APPEARANCES (continued):

Roger J. Whiteford
John J. Wilson
Jo V. Morgan, Jr.,
Attorneys for National Association of Real Estate Boards.

William Leahy
William J. Hughes, Jr.,
Attorneys for Washington Real Estate Board.

537 PROCEEDINGS

The CLERK: The case of National Real Estate Boards and Washington Real Estate Board.

Mr. KRAMER: If the Court please, on page 531 of the transcript, during the examination of Mr. Beitzell—and by the way, your Honor, may I take this opportunity to say that the transcript we have been getting of this case is without question the finest piece of reporting I have ever seen.

Mr. LEAHY: I don't hear him.

Mr. KRAMER: I say the transcript in this case is the finest piece of reporting, technically, I have ever seen.

Mr. LEAHY: We always have good work in the District of Columbia.

The COURT: What is it about page 531?

Mr. KRAMER: On page 531 the witness stated:

"A. It (meaning the regular commission rate) has been considered a fair rate of compensation for your efforts.

"Q. By whom?

"A. By the general public, the courts, and everyone else."

The Government moves, if the Court please, that the responses of the witness that I have read, and the two following responses, be stricken from the record, and that
538 the jury be instructed to disregard those answers.

The COURT: Why?

Mr. KRAMER: On the ground, if the Court please, that what others feel about the rates of commission, and particularly what courts feel about the rates of commission,

other than this court, is irrelevant. The Government is willing to take up the battle on that issue, of course.

We have cases which say that the rates are not reasonable, and I would be delighted, your Honor, to go into them.

The COURT: I don't think it is of sufficient importance. What difference would it make if there was in fact a conspiracy to fix the rates?

Mr. KRAMER: That is exactly my thought, your Honor.

If the Court please, Mr. Maletz will now examine the next witness.

Mr. MALETZ: Call Mr. Buchanan.

Thereupon,

J. WESLEY BUCHANAN was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. MALETZ:

Q. Will you state your full name, please?

A. J. Wesley Buchanan.

Q. Where do you live, Mr. Buchanan?

539 A. In Kensington, Maryland.

Q. What is your business, sir?

A. Real estate.

Q. You have a real estate brokerage office?

A. Brokerage office and building.

Q. Do you own your own business?

A. Yes, sir.

Q. Is it incorporated?

A. No, sir. My brokerage business is not incorporated; my building business is.

Q. I can't hear you.

A. I say my brokerage business is not incorporated. I operate as an individual.

Q. Do you employ any salesmen, Mr. Buchanan?

A. Yes, sir.

Q. How many?

A. About eighteen or nineteen; it varies from eighteen to twenty.

Q. Are all the salesmen employed by you licensed?

A. Yes, sir.

Q. Mr. Buchanan, I wonder if you would explain to us, the difference between a broker and a salesman?

A. A broker is licensed to conduct a real estate business

in the sale and management and the handling of real estate.

540 A salesman is employed by the broker to do just what he has to do, to sell under the license of the broker. A salesman also, incidentally, is licensed as a salesman in a particular brokerage office.

Q. Do you know, Mr. Buchanan, how many licensed salesmen are employed by members of the Washington Real Estate Board?

A. I do not, sir.

Q. Are you, sir, a member of the Washington Board?

A. Yes, sir.

Q. Are you a member of the National Association of Real Estate Boards?

A. Yes, sir.

Q. And for how long have you been a member of the National Association?

A. Well, the two go together, I think. I have been a member, as I recall it, since the spring of 1931.

Q. Of the National Association?

A. Of both.

Q. Have you been a member of the Washington Board for the same period of time?

A. Yes, sir.

Q. Have you ever been during that period of time, an officer or a director of the Washington Board?

A. Yes, sir.

541 Q. Do you recall the years in which you have been a director?

A. I do not, sir; several years ago.

Q. Have you been an officer or director of the National Association of Real Estate Boards?

A. No, sir.

Q. Are you familiar with the constitution and by-laws of the National Association?

A. Well, vaguely.

Q. Have you read the and by-laws?

A. I don't believe I have.

Q. Have you ever seen a copy of it?

A. I don't remember whether I have or not.

Q. Are you familiar with the Code of Ethics of the National Association of Real Estate Boards?

A. Again, vaguely.

Q. I show you Government's Exhibit 6, which is the Code of Ethics of the National Association and ask you to

examine that document. Have you ever seen the original of that document before?

A. Yes, sir.

542 Q. Do you know whether you have a copy of that document in your office?

A. I am sure that I have.

Mr. LEAHY: I didn't get the answer.

The WITNESS: I am sure that I have.

By Mr. MALETZ:

Q. Do you have a copy in your office?

A. I am sure that I have.

Q. Mr. Buchanan, are you familiar with the constitution and by-laws of the Washington Real Estate Board?

A. Somewhat, yes.

Q. Have you read the provisions of the constitution and by-laws of the Washington Board?

A. I think I have.

Q. Are you a realtor, Mr. Buchanan?

A. Yes, sir.

Q. I wonder if you would tell us, in your own words, what a realtor is.

A. A realtor is a member of the local real estate board affiliated with the National Association of Real Estate Boards.

Q. I show you Government Exhibit 3 and ask you to examine the inside cover of the front page. Just read it over to yourself.

Have you seen that provision before?

543 A. Yes, sir.

Q. It says and I quote, in part:

"Every realtor has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association, and adopted by his own board," and so forth.

Isn't it true, Mr. Buchanan, that every member of the National Association has agreed with it to abide by the Code of Ethics of the National Association?

A. Yes, sir.

Q. And, in return, the National Association agrees with that member to license the member to use the term "Realtor"; is that not correct?

A. Well, I have never heard it put that way.

Mr. WHITEFORD: I object to that. That is a statement of law.

Mr. MALETZ: Your Honor, I think the question calls for a statement of fact rather than a conclusion of law.

The COURT: What is the question?

Mr. MALETZ: Will you read the question, please?

(The pending question was read by the reporter.)

The COURT: Sustain the objection.

By Mr. MALETZ:

Q. Isn't it true in the event you flagrantly violate the Code of Ethics, the National Association would take away the term "Realtor" from your business?

544 Mr. LEAHY: Object. It is argumentative.

Mr. WHITEFORD: Object.

The COURT: Sustained.

By Mr. MALETZ:

Q. But you do say, Mr. Buchanan, that you agree with the National Association to abide by the provisions of its Code of Ethics; is that correct?

A. That is correct.

Q. Mr. Buchanan, I show you Government Exhibit 6 again. Would you examine Article 9 and I also ask you, Mr. Buchanan, to examine Article 35. Have you seen those two provisions before?

A. Yes, sir.

Q. You have seen Article 9 which states, "The schedule of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor"?

A. Yes, sir.

Q. That is a correct reading, is it not?

A. Yes, sir.

Q. And Article 35 states, "No instructions nor inducements from any client or customer relieve the Realtor from his responsibility strictly to observe this Code of Ethics"?

A. Yes, sir.

Q. That is a correct reading, is it not?

545 A. Yes, sir.

Q. Mr. Buchanan, you agree then, I take it, that you will abide by these two provisions of the Code of Ethics; is that correct?

A. That is correct.

Q. Stated in a different form, you agree that you will abide by a provision which states that you should observe the schedule of fees or commissions established by the Washington Board; is that correct?

A. That is correct, sir.

Q. Mr. Buchanan, did you ever receive a communication from the National Association stating that the Code of Ethics of the National Association was merely advisory?

Mr. WHITEFORD: I object.

Mr. MALETZ: I don't understand the objection, you Honor.

The COURT: I will allow him to answer.

The WITNESS: I can't recall whether I have or not.

By Mr. MALETZ:

Q. Did anybody in the National Association ever tell you that the Code of Ethics of the National Association was merely advisory?

A. I can't recall that either.

Q. Mr. Buchanan, do you agree with the Washington Board to subscribe to the Code of Ethics of the Washington Board?

546. A. Yes, sir.

Q. And do you agree with the Washington Board to abide by the rules and regulations of the Washington Board?

A. Yes, sir.

Q. Are you familiar, Mr. Buchanan, with the schedule of commission rates adopted by the Washington Board and in effect prior to February, 1943?

A. Yes, sir.

Q. Did you generally adhere to those rates?

A. Generally, on standard deals or usual deals, yes.

Q. Did the members of the Washington Board generally adhere to those rates?

A. I think so.

Q. Mr. Buchanan, do you recall being present at a special meeting of the members of the Washington Board at the Empire Room of the Hotel Ambassador in February, 1943?

A. I don't recall whether I attended that particular meeting or not. We had a number of meetings and it is impossible to recall which meetings we attended. We had a number of meetings.

Q. I show you Government Exhibit 20 and ask you to examine the document. Will you read that document, Mr. Buchanan?

A. Read the whole thing?

547 Q. Yes. Try to refresh your recollection about the meeting.

A. Do you want me to read this whole thing?

Q. I will ask you, Mr. Buchanan, after reading it, if that does not refresh your recollection?

A. Yes, sir.

Q. And will you tell us what transpired at that meeting?

Mr. LEAHY: I object to the question. It is too general. What action was taken officially?

The COURT: I will sustain the objection.

Mr. MALETZ: All right.

By Mr. MALETZ:

Q. Do you recall what action was taken in that meeting?

A. I do not recall.

Q. I beg your pardon?

A. I don't know whether it was that meeting or some other meeting at which the commission schedule was changed. It was changed, but I don't remember which meeting.

This is a meeting where the report of the Brokers Committee studying commissions was read and approved.

Q. Is it not true that you agreed at this meeting, with the other members of the Board, that the standard rate of commission on the sales of real estate in Washington
548 was to be 5 per cent on the first $50,000 and 3 per cent on the excess?

A. That is right.

Q. Did you feel, Mr. Buchanan, at that time, that uniform action by members of the Board with respect to commission rates was advisable?

A. May I ask what you mean by the words "uniform action"?

Q. Action by various members of the Board, acting together.

A. Yes, sir.

Q. What is your answer?

A. Yes, sir.

Q. You thought it was advisable?

A. It was necessary. You can't change a commission rate without changing the by-laws, and you can't change those without action of the members of the Board.

Mr. LEAHY: We can't hear the witness.

The COURT: He said you couldn't change the commission rate without action of the members of the Board.

This was merely a meeting of the Board of Directors, wasn't it?

The WITNESS: No, I think this was a meeting—

The COURT (interposing): Was that the entire Board meeting?

549 Mr. MALETZ: Yes, sir.

By Mr. MALETZ:

Q. Is it not true, Mr. Buchanan, that members of the Board did take uniform action with respect to commission rates?

A. Yes, sir.

Q. That is true?

A. That is true.

Q. Mr. Buchanan, I show you Government's Exhibit 26, a standard form of sales contract issued by the Washington Board in 1941, and ask you to examine the document, (handing exhibit to the witness).

Have you examined the document, sir?

A. Yes, sir.

Q. Prior to August 27, 1947, Mr. Buchanan, did your firm use a similar form of sales contract?

A. Somewhat; there was a little variation.

Q. I call your attention to paragraph 16, which says:

"The seller agrees to pay to agent the regular rate of commission fixed by the Washington Real Estate Board."

Did your contract contain that provision?

A. I don't remember whether we had exactly that phraseology or not.

My recollection is it referred to the standard rate of commission instead of to the regular rate.

550 Q. Standard rate of commission fixed by the Washington Board?

A. It meant the same thing.

Q. It meant the same thing?

A. Substantially, yes.

Mr. MALETZ: I have no further questions, your Honor.

Mr. LEAHY: May I see those exhibits again, please?

Mr. MALETZ: Surely (handing exhibits to defense counsel).

Cross Examination.

By Mr. LEAHY:

Q. Mr. Buchanan, I couldn't quite hear your answer as to how long you have been engaged in the real estate business here.

A. I am sorry I didn't speak louder. In my own office since January, 1931.

Q. Your own office?

A. Yes, sir.

Q. Before that time were you engaged as a salesman in any other office?

A. As a sales manager.

Q. As a sales manager? With what office was that?

A. Sales Director for Shannon-Luchs Construction Company immediately prior to opening my own office, and prior to that as Sales Manager for the firm of M. & R. B. Warren.

551 Q. So since what date have you been familiar with real estate, its sale, management, construction, leasing, exchange, and so forth, here in the District of Columbia?

A. Since the summer of 1926.

Q. And your own office is located where?

A. 1732 K Street, Northwest.

Q. And how many salesmen do you have in your office?

A. In the Washington office I have about ten salesmen. I have a branch office in Virginia.

Q. In Virginia?

A. Yes, sir.

Q. What part?

A. 1501 Columbia Pike, Arlington.

Q. And is your Virginia office within the jurisdiction of the Washington Local Real Estate Board?

A. I think the Washington Board takes in Washington and nearby Maryland. There is another real estate board known as the Northern Virginia Board, which takes in Arlington and Fairfax Counties and the City of Alexandria.

Q. But your Washington office is under the jurisdiction of the Washington Real Estate Board?

A. That is right.

Q. And are all of the salesmen in your office members of the Board?

A. No, sir.

552 Q. About how many of them are not members of the Board?

A. I am sorry, I can't answer that. I think about half of our men are and half are not. It is the choice of the salesmen, if they want to join. They are obligated to comply with the Board, because our membership with the Board automatically binds them to the ethics of our office, the individuals.

Q. But it does not require the salesmen to become members of the Local Board?

A. That is right.

Q. Are you familiar with other real estate brokerage offices here in the District?

A. Yes, sir.

Q. And of your own personal knowledge do you know whether other salesmen who are employed in the other real estate offices are likewise, some of them, not members of the Local Board?

A. I am sure you will find that is correct.

Q. There are about, including brokers and salesmen, 4,000 people selling real estate in the District licensed by our Licensing Commission?

A. I think that is correct.

553 Q. And you have in the Washington local board about 250 brokers and a couple of hundred salesmen members, is that right?

A. That is about correct, yes, sir.

Q. Your attention was drawn to the fact that you, as a member of the local board, are also a member of the National Real Estate Board?

A. That is right, sir.

Q. And were you handed a copy of the Code of Ethics of the National Association of Real Estate Boards? You recall that, don't you?

A. Yes, sir.

Q. I think you said that you thought you had a copy of the Ethics in your office?

A. I know we have, yes, sir.

Q. And also do you have a copy of the constitution and by-laws of the National in your office?

A. I assume we have in the file somewhere.

Q. But you don't know?

A. That is right.

Q. There are altogether in this Code of Ethics 35 provisions, aren't there?

A. Yes, sir.

Q. And they relate to professional relations, 11 of them; is that right?

554 A. Yes, sir.

Q. Relations to clients relate to 9 more?

A. Yes, sir.

Q. And then relations to customers and the public relate from Article 21 to Article 35, inclusive?

A. Yes, sir.

Q. Your attention was particularly drawn to Article 9?

A. Yes, sir.

Q. "The schedule of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every realtor."

You are familiar with that?

A. Yes, sir.

Q. In your own personal experience or knowledge, have you ever known the National Association in any way to attempt to police the individual contracts which you made with your individual customers?

A. I have never heard of it, sir.

Q. You were asked, for instance, if you had received from the National any correspondence with reference to the character of interpretation which should be placed upon that particular Section 9.

A. To my knowledge, I have never received any such communication.

555 Q. Have you ever received any correspondence from the National saying that if you didn't observe it you would be called in for disciplinary action?

A. I have never received such a document as that.

Q. Have you ever received any correspondence; did you ever have any conversation; did you ever get any telegrams or was there any communication whatsoever between the National or any of the other officers or directors with you personally with regard to the commissions you charged?

A. None at all.

Q. To your knowledge, have you ever known of any such communication with any other member of the Washington Board?

A. I have never known of such instance.

Q. To your knowledge, has that ever been considered by any member of the Washington Board other than advisory?

Mr. Maletz: Objection, your Honor. I ask the witness to confine his answer to his own knowledge.

The Court: Sustained.

By Mr. Leahy:

Q. Has that always been advisory as a sort of ideal conduct which you should observe?

A. That is right.

Q. And it is part and parcel of the Code of Ethics?

A. Yes, sir.

Q. In other words, was there anything different
556 about what the National said to you in Article 9, in your own judgment and in the course of conduct which you established under this Code, than to all the other articles?

A. That is right.

Q. You tried to observe them all because they referred to decent, honest conduct in your relation to customers, in

relation to the public and in relation to your fellow brokers; isn't that right?

A. That is correct, sir.

Q. You were also asked about the Code of Ethics of our local Washington Real Estate Board. You recall that that too uses pretty much the same language, doesn't it?

A. Yes, sir.

Q. That the schedule should be observed?

A. That is right. I am familiar with the Code of Ethics of the local board.

Q. I think you said at one time you were a director of your local board, is that right?

A. That is right.

Q. With reference to that particular question—I believe it is section 9 and correct me if I am wrong—of the local board—

A. (Interposing) I don't remember the section number.

Q. You know the section I refer to?

A. Yes.

557 Q. Was that at any time ever interpreted by you or when you were a member of the board by the board as other than advisory, as an ideal conduct which you should observe?

A. That is correct the way you said it.

Q. Have you ever at any time been called in for any disciplinary action by the Washington Board?

A. No, sir.

Q. Do you know of any member of the board who was ever called in?

A. Are you referring to commissions, sir?

Q. With reference to Article 9 on observance of the schedule.

A. No, sir, I never have.

Q. Your office is a pretty active one, isn't it?

A. Yes, sir.

Q. And it deals pretty much with real estate generally throughout the city?

A. Yes, sir. We are essentially a house brokerage firm and a large part of our business is the brokerage of houses.

Q. And that is throughout the entire area?

A. That is right.

Q. You are familiar with the map we have been talking about here for some time?

A. Yes.

558 Q. You remember this map with the dividing lines of the old central portion, I think they called it, of Washington and the outlying portions?

A. Yes, sir.

Q. And in your activities, you have dealt with houses throughout all the areas?

A. Yes, sir.

Q. Isn't it true, Mr. Buchanan, that due to this line, as we see here on the map, that there was a great deal of confusion among the public and among the brokers as to what the schedules of commissions should be?

A. Yes, sir, and among the title companies.

Q. And among the title companies too because of the many breaks in the line and the changes in direction and the route that it takes?

A. That is partly it, sir; and also the boundary lines were subject to a great deal of misunderstanding and lack of understanding. For instance, I think that top line up there is Decatur Street, or whatever street it is. One side of that street, when that was in effect, had straight 5 percent and the other side had 5 and 3. That is, 5 percent on the first $5,000 and 3 above. You had borderline cases — "Why in the world should I pay this and the other fellow pay that?" There was considerable confusion from that.

559 Q. Was there actually confusion to the point which you wanted, and when I say "you" I mean members of the Washington Board wanted to correct it?

A. That is correct, sir.

Q. In other words, the confusion had occurred so often and through so many sources that you felt that ought to be corrected?

A. That is right, sir.

Q. And when you met in February, 1943, you met after a committee, your own committee had made a study, a brokers committee?

A. That is right, sir.

Q. And your own brokers had studied this situation of confusion in that area and wanted to submit to the membership a proposed eradication of the confusion, is that right?

A. That is right. In fact, they did submit it.

Q. You had 5 percent on the first $5,000 and 3 percent thereafter?

A. That is right.

Q. In the local area?

A. That is right.

Q. And you had the straight 5 in the outlying area?

A. That is right.

Q. Isn't it true that the greater portion of the activity of real estate since 1935, for instance, in the District of Columbia, has been in the outlying area?

A. Yes, sir. In my office particularly because we
560 are a house brokerage firm.

Q. And over here in the southeast, over on the Massachusetts Avenue Hill extended, and over beyond in Anacostia; and again all through the northwest area out as far as the boundary line of the District of Columbia and in northwest, Wesley Heights and the Valley?

A. Yes, sir.

Q. And out MacArthur Boulevard, isn't that where the greater portion of the activity was?

A. That is where practically all of the new construction was.

Q. And that was a straight 5 percent without any ceiling whatsoever?

A. That is right.

Q. And the sum total of whatever changes you made in the recommended schedule was putting a ceiling of $50,000 throughout the City of Washington at 5 percent?

A. That is right, and 3 percent above.

Q. You read over this report which was submitted to you and when I say "you", I mean the membership, on February 16, 1943, and I think you said that it refreshed your recollection?

A. Yes, sir.

Q. (Reading:) "Your committee submits that conditions have changed to such an extent since 1917."

Why do you say 1917?

561 A. I think 1917 was the date this boundary line was established.

Q. Who established the recommended commission of 5 and 3 in this old area, do you know?

A. The Real Estate Board.

Q. You didn't come into existence, the Washington Real Estate Board, until 1928, did you?

A. I think it was but before that there was a Real Estate Brokerage Association or whatever it was called. That is before my day.

Q. But that was way back in 1917?

A. That is right.

Q. And had that become the accepted fair compensation in that area, generally, in the ordinary case of the sale of real estate?

Mr. Maletz: Objection.

The Court: Did someone make an objection?

Mr. Maletz: Yes, I object.

The Court: Why?

Mr. Maletz: The witness is not testifying as to his own knowledge.

Mr. Leahy: Are you or are you not?

Mr. Maletz: And another thing, Mr. Kramer called to my attention, is the witness is testifying about something on the fairness and reasonableness of the rates which
562 I think your Honor has held to be immaterial.

The Court: I don't recall. As I recall, his testimony was that the ceiling on the commission was $50,000 in the outlying districts where before there was no ceiling and the rate on the city proper, within those boundaries, was made 5 per cent up to $50,000. In other words, there was an overall uniformity. That might be reasonable. That is not the crux of the case.

Mr. Maletz: Thank you, your Honor.

Mr. Leahy: Will you read the question, please?

(The pending question was read by the reporter.)

The Witness: I am sorry, sir.

By Mr. Leahy:

Q. I notice here it said "Since 1917." You said that that had been fixed by some other group?

A. That is right.

Q. At 5 and 3 as the recommended rate with that old city area?

A. When that was established, that was back in the horse and buggy days before the days of automobiles and before Washington had grown. That was the main body of the city with the limited transportation or slow transportation of horse and buggy. As automobiles came in and this separate section of the city became built up, all new construction had to go farther out.

563 Q. And then the automobile—

A. (Interposing) And we got out there and we had new properties to sell and we had old properties that had to be remodelled and fixed up and reconditioned before they were even salable, and the time difference in an automobile was a trifle.

Q. And I think you said since 1917 you have been operating on a recommended commission there of 5 and 3?

A. That is right.

Q. And also on the 5?

A. On the 5 above.

Q. And was that pretty generally accepted throughout by all the brokers of the District, whether they were members of the Real Estate Board or not?

A. I think it was accepted by everybody, by the brokers, by the banks and by the courts themselves, for that matter.

Q. You frequently have been called upon, have you not, to testify as an expert in court?

A. I have on a number of occasions.

Mr. KRAMER: We object. This is the very point I raised with your Honor this morning.

If the witness is going to be allowed to answer this question we want to recall Mr. Beitzell and show the Court that he was mistaken, and he will admit the mistake.

564 The COURT: The only thing is whether or not this witness has testified. I don't know what the next question will be.

Mr. KRAMER: But before that he said it had been regarded as fair by the courts, and I move to strike that statement.

The COURT: I will let it stand. Go ahead.

By Mr. LEAHY:

Q. Do you find anything in what you have read there, which was adopted in that meeting of February, 1943, anything which relates to the commissions which you shall charge?

A. If I understand your question, sir—

Q. (Interposing) You were handed that and asked to read it over—

A. Yes, sir.

Q. —on your direct examination, and you did.

A. Yes, sir.

Q. You said it refreshed your recollection?

A. Yes, sir.

Q. And then you were asked some further questions about whether or not there was uniformity of action under the resolution.

A. Yes, sir.

Q. Do you find anything in that resolution which was adopted which relates to commissions whatsoever to be

charged by the brokers in their individual transactions? If there is, kindly point it out.

565 A. This brings out the Brokers' Committee's report that recommended to the—

Q. (Interposing) Haven't you got the report right on page 2?

A. That is right.

Q. Get the report and find a line in there that relates to commissions to be charged by you brokers, or your salesmen, in individual transactions with your clients.

A. I don't see it here.

Q. It is not there, is it?

A. No, sir.

Q. There isn't a line there about what you brokers should charge as commissions?

A. No, sir, not under the quotes in the report.

Q. There isn't a line in there that says the brokers, in the resolution which is adopted, there isn't one single line respecting commissions in the District of Columbia, or incorporating into the Code of Ethics a schedule which must be observed respecting commissions, is there?

A. There is not a "must" on the commission rate anyhow.

Q. I know, but there isn't anything in there that you can find, is there?

A. There is on the first page, not under the quotations, sir—this paragraph here, sir, (indicating).

Q. Well, let's take that; let's get it so the jury will

566 know it, so we won't have anything in a huddle here?

"Mr. Sandoz, Chairman of the Brokers' Committee, was called upon to read the Committee's report, which provided for the elimination of the commission boundary zone; the adjustment of the commission rate to provide for a commission of 5 percent up to $50,000 and 3 percent on excess above $50,000, on all sales in the District and adjacent Metropolitan area," and so on. He read the Brokers' Committee's report, didn't he?

A. Yes, sir.

Q. Then the report is incorporated; whoever wrote the minutes up said he read those.

When you read the committee report you don't find any such thing in there, do you?

A. It is not in there.

Q. You were asked about this uniformity of action and I

couldn't quite understand your answer because I couldn't hear it, Mr. Buchanan.

But there wasn't any question but what the Brokers' Committee had recommended the elimination of any boundary zone that caused the trouble, isn't that true?

A. That is right, sir.

Q. Now, if any schedule was fixed was it not a recommended schedule which was publicly adopted for the benefit of the public, as a representation of the fair and
567 adequate compensation of you brokers in the ordinary, usual case, brokers within the local board?

A. That is right, sir.

Q. And that's all it was, wasn't it?

A. Exactly.

Q. Was there any direction that you must observe that schedule to the point where you would be brought up on disciplinary action?

A. Absolutely none.

Q. Was there anything said or done by the National Board which compelled you to charge that recommended schedule and none other?

A. None.

Q. Wasn't each member of the local board always left free to contract with any member of the public with relation to any commission which either the purchaser or the seller, whomever he represented, wished to contract with you?

A. That is right.

Q. In other words, was your freedom to act as you chose to act, with reference to a valuation which you put on your own services, taken from you?

A. That's right.

Q. Was it or was it not?

A. It was.

Q. Was your freedom to make a contract with
568 your own customers taken away from you?

A. Oh, no; I am sorry, I didn't understand the question.

Q. In other words, after the adoption of this particular Brokers' Committee report you still went along, did you not, and negotiated each real estate transaction, whether it was a sale, a lease, or an exchange, or a management contract, you negotiated that freely with each one with whom you dealt?

A. That is right.

Q. And whatever agreement you struck was the agreement between the parties?

A. That is right, sir.

Q. And was there ever any control over you by the National Board whatsoever with regard to that freedom of contract?

A. Absolutely none.

Q. Did the National Board ever try to restrain the public in its freedom or any member of the public in its freedom to make whatever contract it wanted with any member of the Board?

A. Not to my knowledge.

Q. In fact, this standard form of contract, which you have just been shown, which is Government's Exhibit 26, and I believe your attention was directed to Section 16, it says in there, "The seller agrees to pay," doesn't it?

569 A. That is right.

Q. I think you said you didn't believe you used the word "regular" commission?

A. My memory is we used the word "standard".

Q. You used the word "standard"?

A. I think we used the word "standard" commission. I may not be right on this. As I recall the Washington Code of Ethics on Commissions refers to a standard rate—the phrase is "standard," as I remember, if I remember correctly.

Q. Take a look at it; I am quite sure it uses the word "standard".

A. If my memory is correct, yes.

Q. Isn't it a fact the National Board thought so much of the term "standard" that it didn't even use it in its own approved contract? Doesn't this use "regular"?

A. It uses "regular," yes, sir.

Q. And this was published, wasn't it, under the so-called copyright of the National Board?

Mr. Kramer: Are you speaking of the National Board?

By Mr. Leahy:

Q. Of the Washington Board, isn't that right?

A. That is right.

Q. So when they are talking about standard rates, or regular rates, they are interchangeable, aren't they?

A. I would think so, sir.

570 Q. And when the rates of the comm. sions of the members were concerned the rates were fixed by the member in the individual case with the individual customer?

A. That is correct, sir.

571 Q. To be sure that we are not mistaken, so the jury will know this, in other words, under the Code of Ethics it says, "Brokers should maintain standard rates," and here under the contract it is the "regular" rates.

The COURT: Just a minute, Mr. Leahy, if I may interpose. It says, "Standard rates of commissions adopted by the Board."

What does that mean to you? That means the 5 per cent on the first $50,000, doesn't it?

The WITNESS: That is right.

The COURT: Three per cent after?

The WITNESS: That is right.

The COURT: There wasn't any question about that, was there?

The WITNESS: Not at all.

By Mr. LEAHY:

Q. The standard rate, is that the same as the regular rate?

A. I don't know whether I can answer yes or no on that. I know how I feel about it and I think as all of us do: there is a difference between a standard deal and other deals that can be made. I don't know whether you want me to explain—

Q. I will bring it out on some questions here?

A. All right.

572 Q. This Code of Ethics, which has all been for the jury, undertakes to control the ethical standards of the members of the Washington Board, does it not, not only with each other, but with the public?

A. That is right, sir.

Q. Isn't that correct?

A. That is correct, sir.

Q. So that each one of these particular sections in the Code of Ethics was adopted not only as an ethical standard for the brokers but also for the interests of the public?

A. That is right, sir; that is correct.

Q. And one of the matters and things which the Washington Board, as a Board, sought to clarify for the public was what it, the Board, felt was a fair and reasonable compensation for services which were rendered by brokers to the public?

A. That is right.

Q. Isn't that right?

A. That is correct, sir.

Q. And that made those public property?

A. That is right.

Q. So that the public generally was considered—

A. That is right.

Q. —in the adoption?

A. Correct, sir.

573 Q. Number one, "brokers should maintain the standard rates," does that mean any more than that in accordance with the opinion of the Washington Board that a fair return and fair compensation for the services of the type rendered by the members of the Board, in the public interest, were whatever they accounted them to be?

A. That is right, sir.

Q. But you always had the right thereunder to make a charge in any given case of whatever you individually thought was fair?

A. That is right.

Q. And the Board never sought to control you in that contract?

A. That is right.

Q. And you know of no instance in which the Board ever sought to control the freedom of contract among the members in their own individual cases, with reference to their own commissions?

A. That is right, sir.

Q. Is that true of all the members of the Real Estate Board to your knowledge?

A. Yes, sir.

Q. You were asked the question whether or not generally you agreed or generally adhered to those rates, referring at the time, when the question was put, to

574 5 per cent up to $5,000 and over?

A. Yes, sir.

Q. It is a fact, is it not, that generally throughout the entire District of Columbia, among the public, among the other 3,500 licensed salesmen in the District, a regular commission for real estate in the ordinary transaction is recognized.

A. That is right.

575 Q. That is admitted generally, isn't it?

A. That is right, sir.

Q. So isn't it so generally known that when you talk about a regular rate of commission for the sale of real

estate in the District that it is pretty generally known among the owners of property and all of those dealing in real estate what is the rate of commission?

A. That is right.

Q. And that is known and has been represented to courts as the regular rate, has it not?

A. That is right.

Q. To your knowledge?

A. That is right.

Q. By you, as an expert?

A. That is right.

Q. And accepted?

A. That is right.

Q. So that in the ordinary case, the regular rate of commission referred to in the contract is the generally recognized commission throughout the Washington Board and by those who are not members of the Board and the public, generally?

A. That is right.

Q. But in any given case, if the conditions are such that the regular commission ought not to be adhered to, you don't hesitate to make the contract to cover the case?

576 A. That is right, sir.

Q. And there is no penalty attached to it?

A. No, sir.

Mr. LEAHY: That is all,

Re-direct Examination.

By Mr. MALETZ:

Q. Mr. Buchanan, you spoke of confusion because of the boundary line between the two zones. What was the reason for eliminating the zones if you felt free to charge any commission you desired?

A. I think, sir, if you will refer to what I said that in most instances the usual or standard transaction, there was a uniformity of commissions charged. There are certain instances, however, where we varied from that for a specific reason.

Mr. MALETZ: Thank you.

No more questions, your Honor.

The COURT: Can you tell me if a real estate broker can charge any commission he wants why bother having a standard form of 5 percent?

The WITNESS: If your Honor please, there are certain instances where we feel we would do an inequity to the public by rigidly adhering to that.

The COURT: I understand that but I am trying to find out why was it necessary at all to have the Washing-
577 ton Real Estate Board meet and agree on a reasonable rate of 5 percent on the first $50,000?

The WITNESS: Because in the vast majority of cases, those are the proper rates and what we consider an equitable pay for a broker's services.

The COURT: Those are the rates that you agreed upon?

The WITNESS: That is right. We consider ourselves more or less in the same situation as a surgeon, in that if we have a client who is not well to do we charge a smaller fee. For instance, recently we have had the GI Bill of Rights and in those cases we have not charged as much. We have felt it was not necessary to charge as much.

The COURT: Very well.

(Witness excused.)

Mr. KRAMER: If the Court please, in view of the testimony that has been given this morning, the Government has decided to call no further witnesses today and would like merely the opportunity, over the long week end, to review the transcript to be sure that we have covered all the points we felt we should cover and we will rest on Tuesday.

The COURT: Will counsel come to the bench?

(Thereupon, counsel approached the bench and a conference was held which was reported but not included by order of the Court.)

The COURT: Ladies and gentlemen, you are ex-
578 cused until 9:45 Tuesday morning.

(Thereupon, at 11:40 o'clock a. m., the trial was recessed until Tuesday, June 1, 1948, at 10 o'clock a. m.)

579 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950–47

UNITED STATES OF AMERICA,
PLAINTIFF,
vs.
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and WASHINGTON REAL ESTATE BOARD,
DEFENDANTS.

Washington, D. C.,
Tuesday, June 1, 1948.

The above entitled action came on for further trial before the Honorable EDWARD M. CURRAN, Associate Justice, and a Jury, at 10 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor H. Kramer, Trial Attorney.
Joseph P. Kelly, Jr.
Herbert N. Maletz,
C. Heyward Belser,
Attorneys, Department of Justice.

580 APPEARANCES (Continued):

On behalf of the defendants:
Roger J. Whiteford
John J. Wilson
Jo V. Morgan, Jr.,
Attorneys for National Association of Real Estate Boards.

William E. Leahy
William J. Hughes, Jr.,
Attorneys for Washington Real Estate Board.

582 PROCEEDINGS

The CLERK: The case of National Association of Real Estate Boards and Washington Real Estate Board.

Mr. KELLY: Call Mr. Rugers.

Thereupon,

PAUL E. RUGERS was called as a witness by the United States, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. KELLY:

Q. Will you state your full name, please?

A. Paul E. Rugers.

Q. Where do you reside?

A. Washington, D. C.

Q. And what is your business or occupation?

A. Investigator for Real Estate Commission, District of Columbia.

Mr. LEAHY: Would you speak up, please? We don't hear you.

The WITNESS: Investigator for the Real Estate Commission, District of Columbia.

By Mr. KELLY:

Q. Is the Real Estate Commission of the District of Columbia a governmental agency?

A. It is.

583 Mr. KELLY: Will you mark these for identification as Government's Exhibits 52 and 53?

(Report of Real Estate Commission, District of Columbia, 1945-1946, marked for identification Government's Exhibit No. 52.)

(Reports of Real Estate Commission, District of Columbia, 1946-1947, marked for identification Government's Exhibit No. 53.)

By Mr. KELLY:

Q. Mr. Rugers, I show you Government's Exhibit 52 for identification, which is a report of the Real Estate Commission of the District of Columbia, 1945-1946, and ask you if that is the publication of your office?

A. It is.

Q. And is this publication published in provision with law?

A. It is.

Q. I show you Government's Exhibit 53 for identification, report of the Real Estate Commission, District of Columbia, 1946-1947, and ask you if that is a publication of your office?

A. It is.

Q. And that is also published in accordance with law?

A. It is.

Q. Referring to Government's Exhibit 53, which is the report of 1946-1947, I ask you to look at page 1 of
584 that report, Mr. Rugers, and where it refers to the record of licenses issued July 1, 1946, to June 30, 1947, and I ask you to tell the Court and jury the total number of licenses, that is, for brokers and salesmen, which were in force on the 30th of June, 1947.

A. 4,361.

Q. Mr. Rugers, you are reading from a line of figures which states at the top: "Originals and Renewals."

If I may call your attention, there is another line of figures under the heading "Duplicates."

Another line of figures under the heading: "Exchange."

Another line of figures under the heading: "Terminated."

Another line of figures under the heading: "In Force 6-30-1947."

Would you read to the jury the number of licenses which were in force, the total number on that date?

A. Yes, I am sorry, 3,525.

585 Q. Referring to Government's Exhibit No. 52 on page 51, I ask you if that shows the list of licensed real estate salesmen as of December 31, 1946; showing the employing brokers?

A. That is correct.

Q. Is it also correct, Mr. Rugers, that you attempted to make the calculation from that as to the number of licensed salesmen who were employed by members of the Washington Board?

A. That is right.

Q. And that calculation was not completed, is that correct?

A. That is correct.

Mr. KELLY: If your Honor please, I move for the introduction into evidence of Government's Exhibit No. 52 and Government's Exhibit No. 53.

The COURT: Government's Exhibit 52 shows that as of the 30th day of June, 1947, there were in force licenses for brokers and salesmen 3,525?

Mr. KELLY: That is No. 53.

The COURT: You are offering 53?

Mr. KELLY: I am offering 53 also.

The COURT: No objection to 53, I take it, Mr. Leahy?

Mr. LEAHY: No, your Honor.

(The document previously marked Government's Exhibit 53 for Identification was received in evidence.)

586 The COURT: As to Exhibit 52, your did not give any figures from that. You said on December 31 1946, the number of salesmen were licensed who were employed as brokers.

Mr. KELLY: They are continued in this exhibit. We have not had the opportunity to obtain that figure.

The COURT: What is the purpose of introducing 52?

Mr. KELLY: It is for the purpose of showing there are far more than 250 employed.

The COURT: How much does it show?

Mr. KELLY: I am sure if we have time to tabulate it we will arrive at a figure far in excess of 250.

The COURT: I don't know why you want to introduce Exhibit 52. It doesn't show anything.

Mr. KELLY: The reason we are introducing 52 and 53 is that in 53 it shows the number of salesmen up to June 30, 1947.

The COURT: I thought 53 showed as of June 30, 1947, the number, not December.

Mr. KELLY: The reports of the number of licensed brokers.

The COURT: I have admitted 53.

What does 52 show?

Mr. KELLY: Exhibit 52 shows on page 51 the list of licensed real estate salesmen as of December 31, 1946, and also their employing brokers so it will appear from there just how many of those salesmen are employed by
587 members of the Washington Board.

Mr. KRAMER: By using Exhibits 2 and 3.

The COURT: This is a list of licensed real estate salesmen?

Mr. KELLY: That is correct, your Honor. There has been testimony here that the total salesmen and brokers is only some 400-odd in the Washington Board.

The COURT: Let me ask the witness a question.

These salesmen that you have listed here show the employing broker. Do you mean to say that every broker is a member of the Washington Real Estate Board?

The WITNESS: No, your Honor.

Mr. KELLY: If your Honor please, comparing that list with our Exhibit 1, the roster of the Washington Board, we can determine from that exhibit just how many of those salesmen were employed by members of the Washington Board on that date.

The COURT: What does your Exhibit No. 1 show?

Mr. KELLY: This is the complete roster of the Washington Real Estate Board. Comparing that against the employing broker on the right-hand column there—

The COURT: Who is going to do all this figuring?

Mr. KELLY: We would do it, your Honor. We attempted to do it this morning and could not complete it.

The COURT: I will admit this but it merely shows
588 there is a list of licensed real estate salesmen, showing the employing brokers but not every broker listed here is a member of the Washington Board.

Mr. KELLY: That is correct, your Honor.

(The document previously marked Government's Exhibit 52 for Identification was received in evidence.)

Mr. KELLY: No further questions.

Mr. WHITEFORD: I have no questions.

Mr. LEAHY: I don't believe I want to ask any questions, your Honor.

The COURT: You may be excused.

(Witness excused.)

Colloquy

Mr. KRAMER: If the Court please, during the presentation of the Government's case we requested in open court the production of five items which, with the Court's permis-

sion, I would now like to ask counsel if they have been able to produce.

At page 491, my associate, Mr. Kelly, asked the National Association to produce the file referred to in the first paragraph of Exhibit 51.

Mr. WHITEFORD: If your Honor please, I remember the incident and Miss Jones was asked, when she went back, to look to see if she could find anything that corresponded to the suggestions that Mr. Todd made about this file. I told her if she found anything to call me or to ship the material.

589 I had not heard from her so I called her early this morning and she said she had not found anything.

In addition to that may I say, as your Honor will realize, we have accumulated many, many papers in preparation for this case. I have gone through those to see if there was anything that corresponds to the two boxes of papers that Mr. Todd spoke about and I find nothing that I can identify as having been referred to by him in that.

Mr. KRAMER: On page 360, I requested the National Association to produce the revised chart referred to in Exhibit 45.

Mr. WHITEFORD: The revised chart?

Mr. KRAMER: Yes.

Mr. WHITEFORD: What is Exhibit 45, Mr. Kramer?

Mr. KRAMER: That was a letter that was not admitted in evidence, from Mr. Nelson to Mr. Laronge.

Mr. WHITEFORD: The letter was not admitted in evidence?

Mr. KRAMER: That is correct. I say I am calling for the chart referred to in that letter.

Mr. WHITEFORD: I don't remember that you asked me to produce a chart.

Mr. KRAMER: At page 360:

590 Mr. WHITEFORD: I would like to see what the letter says:

Mr. KRAMER: (Reading) "Mr. KRAMER: I was not going to offer this exhibit; I was going to ask counsel to produce the revised chart.

"The COURT: They want the revised chart. Exhibit 42 is excluded,"

and there was one admitted.

Mr. WHITEFORD: I certainly entirely overlooked that. I didn't remember you asked for it, when I heard the letter was excluded.

Mr. KRAMER: It wasn't the letter, it was the report of the Executive Committee.

The COURT: You say Exhibit 45?

Mr. KRAMER: It is Exhibit 43.

Mr. WHITEFORD: Was that in the minutes we had up at the Bench?

The COURT: That is a report of Mr. Nelson; that is what Exhibit 43 is.

Mr. KRAMER: That is right, your Honor. Oh, it isn't that exhibit.

Mr. WHITEFORD: That was in that group of papers?

The COURT: Report of the Executive Vice President, January, 1942. Have you got it there?

Mr. WHITEFORD: No, sir, I haven't and I have no
591 knowledge of them asking for anything in connection with it.

Mr. KRAMER: I suggest that we pass it, your Honor. We may be able to find the transcript reference; the one is obviously wrong.

On page 326 we asked the National Association to produce the minutes for 1935 that would show the members of the Committee on Rates, Rules and Customs.

Mr. LEAHY: For what year?

Mr. KRAMER: 1935.

Mr. WHITEFORD: You had a copy of those minutes, didn't you?

Mr. KRAMER: I didn't have them at the time I asked for them; I gave them back to you.

The COURT: Did you have them at one time?

Mr. KRAMER: I did at one time, yes, sir.

On page 319 I requested the production by the National Association of the compilation of rates charged by various member boards referred to in Exhibit 29.

Mr. WHITEFORD: Exhibit 29 is that vice president material?

Mr. KRAMER: The first sentence says, "We have a compilation of commission rates which is very bulky and voluminous."

Mr. WHITEFORD: In 1935?

Mr. KRAMER: You haven't been able to find that?

Mr. WHITEFORD: I will be perfectly honest with
592 you, I haven't looked for them.

That letter was not put in evidence, was it, and you merely asked would I try to find that Commission Report. I remember you asked me about one in that Vice President's Report, and I told you my information was that was one that had Barnard's Committee in it; that is a guide, but I haven't looked this one up.

Mr. KRAMER: On pages 122 and 139 I asked Mr. Rush or his counsel for a copy of the schedule of commissions for the Washington Board prior to February 15, 1943. I think that is the least important of the five because what is in that schedule has been testified to time and time again.

If counsel has been able to find one I would like it.

Mr. LEAHY: No, I haven't. I will ask Mr. Rush if he has it.

We have nothing except that same schedule Mr. Rush had when he was on the witness stand, your Honor will recall, with a piece of paper pasted over it.

Mr. WHITEFORD: This minute of the members of the Committee on Rates, Rules and Customs in 1935, I think I could somehow get the minutes. The books of minutes, Mr. Kramer, that you gave back to me, that I had given you, are up in my office, and I would be very glad to send somebody up there and get that list, if it is important. I don't see why it is important as to who constituted the National Committee back in 1935, and evidently Mr. Kramer didn't particularly, either, or he would have offered it at the time, but if there is some reason for that I would be glad to accommodate him.

593

Mr. KRAMER: If the Court please, that ends the list of five items.

I would now like to make a motion, which I assume the Court will take under advisement.

Certain exhibits were admitted only against the Washington Real Estate Board. In order to avoid any confusion or doubt in the record I now move the admission against the National Association of the following exhibits already admitted against the Washington Board:

No. 19, Special Notice to all active members of the Board, dated January 22, 1943, at page 143 of the transcript.

The COURT: Exhibit 19? How can I admit Exhibit 19 against the National?

Mr. KRAMER: Well, it is our position, if the Court please, that the Government has established a *prima facie* case against the National and that being so declarations of other members of the combination with them are admissible against them.

In short, our position is that once a combination, whether its purposes are lawful or unlawful, has been established, declarations of any member of that combination are admissible against all the members. The evidence of the combination, however, must be shown by independent evidence.

594

The COURT: But this letter doesn't refer to the National in any way at all.

Mr. KRAMER: That is correct, it doesn't refer to the National in any way.

Our position is that it is a declaration made during the course of the combination between the National and the Local.

The COURT: Your motion to admit Exhibit No. 19 as against the National is denied.

Mr. KRAMER: Exhibit No. 20, the minutes of the special meeting of the Washington Real Estate Board for February 16, 1943.

The COURT: That is along the same character?

Mr. KRAMER: That is right.

The COURT: That is denied.

Mr. KRAMER: And Exhibit No. 21, the special bulletin of the Washington Board.

The COURT: Exhibit 21? I don't have any Exhibit 21.

Mr. KRAMER: You don't have a copy of that. That was the document that was handed to me in open court by Mr. Leahy.

I am perfectly willing to state for the record it is of the same character.

The COURT: That will be denied.

Mr. KRAMER: Exhibit 23, schedule of commissions
595 and fees adopted by Washington Board for December 5, 1944.

The COURT: Exhibit 23?

Mr. KRAMER: That is correct, your Honor.

The COURT: That is a notice that you sent out.

Mr. KRAMER: Excuse me, your Honor; it is Exhibit 25.

The COURT: This is a schedule of commissions?

Mr. KRAMER: That is correct, your Honor.

The COURT: That is put out by the Washington Real Estate Board?

Mr. KRAMER: That is right, your Honor.

The COURT: That is denied.

Mr. KRAMER: Exhibit No. 26 is the form of sales contract.

The COURT: Do you want that against the National, too?

Mr. KRAMER: That is right.

The COURT: That is the contract where the seller agrees to pay to the agent a rate of commission fixed by the Washington Real Estate Board?

Mr. KRAMER: Yes, sir. I don't know whether this would be considered a matter of weight, but it does have the offi-

cial emblem of the National Association on it. I don't suggest it was put out by anyone other than the Washington Board, however.

The COURT: That is denied.

Mr. KRAMER: The final one, which falls in the same
596 category, your Honor, are the schedules of commissions of the Washington Board, revised to February 16, 1943.

The COURT: That is denied.

Mr. KRAMER: And finally, Nos. 52 and 53; they were admitted this morning.

Mr. LEAHY: 53 wasn't admitted, was it?

The COURT: Yes, I admitted Exhibit 53 for the purpose of showing the number of licenses.

How can that have anything to do with the National Board, the number of licenses that were issued in the District of Columbia?

597 The COURT: I have admitted it to show that in the District of Columbia there were licensed and in force on June 1, 1947, 3,525 brokers and salesmen. How are you going to bring the National Board into that number of licenses?

Mr. KRAMER: If it has been admitted to show that, I grant, your Honor, we have shown all it can show. My thought was that this motion was purely technical.

The COURT: You understand all of these exhibits, Mr. Kramer, as in evidence?

Mr. KRAMER: That is right.

The COURT: For consideration in this connection but where there is no connection or no linking up with the National Board, I cannot admit it as evidence against the National Board.

Mr. KRAMER: I follow your Honor and that is all.

The Government rests, your Honor.

Mr. WHITEFORD: If your Honor please, I have a motion to make which I have in writing and I am speaking on behalf of the National Association.

The COURT: I take it you want to argue the motion?

Mr. WHITEFORD: Yes. I would like to present it and I understand there will be other motions, too. I suggest that the jury might be excused.

The COURT: The jury will be excused.

(The jury retired from the courtroom.)

Argument for Judgment of Acquittal on Behalf of
598 *the National Association of Real Estate Boards*

Mr. WHITEFORD: If your Honor pleases, in behalf of the National Association I make this motion for a judgment of acquittal.

The National Association of Real Estate Boards move for a judgment of acquittal on the ground that no substantial evidence has been adduced against the said defendant upon which a reasonable mind could infer guilt beyond a reasonable doubt.

The National Association makes the same motion on the ground there has been no showing of any violation of the Sherman Act.

In this last aspect, the motion is in the nature of a demurrer to the evidence.

I may say at the outset that I file this motion in this form as seemingly required by the Circuit Court in the Gypsum case which is referred to, having in mind that a motion granted on those grounds would amount *res judicata* so far as the equity suit is concerned.

I may say to your Honor, however, that so far as the National Association is concerned I am not interested in trying an equity suit on the difference in the meaning between the word "should" or the word "shall" or "ought" or whether it applies nationally or whether it applies to the District of Columbia. My prime purpose in this motion at this time is found in the first paragraph of that mo-
599 tion and, in order that I may give you such views as I have about it, I wish to refer to the ninth and tenth paragraphs and perhaps the twelfth, thirteenth and fourteenth for it is this indictment that the Government has to prove so far as NAREB is concerned.

* * *

628 *Argument on Motion*

(in reply)

* * *

Mr. KRAMER:

In conclusion, if your Honor please, I want to say once more with the exception of the intent and purpose of the Committee on Rates, Rules and Customs, with that exception I don't think that Brother Whiteford and I have any dispute about the facts in this case. I think your Honor is presented with a question of law which is pretty neatly tied up with the consideration and that is: Is an agreement by

each member of an association in the District of Columbia with a third party to abide by whatever rates of commissions that association establishes an agreement, a price fixing agreement in restrict of trade? We say it is and we say it is for the very same reason that the Court said it was in the Gypsum case.

• • •

631 *Argument for Judgment of Acquittal on Behalf of the Washington Real Estate Board*

Mr. Leahy: If the Court please, for and on behalf of the Washington Real Estate Board and that nebulous, undescribed unidentified group called "co-conspirators", I wish to present, without repetition, the same motion
632 as Mr. Whiteford presented on behalf of the National Real Estate Boards and to argue, perhaps a little more broadly, the questions involved before your Honor.

• • •

723 *Colloquy*

The Court: The point I am interested in is, having in mind the evils that existed, and the reason for the purpose of the Sherman Act, I take it that the Government contends that despite that the Sherman Act was passed to cover the situation that we have here.

Mr. Belser: That is the Government's contention, sir.

The Court: And that you contend that this price fixing, or the wage fixing, or rate fixing, and nothing else, is an unreasonable restraint of trade in and of itself. That is what I would like you to discuss and to direct your argument to, to show me that the mere grouping of individuals, who are members of the Washington Real Estate Board and perform services and adopt a standard fee, which is claimed is based on reason, a reasonable fee, that the mere agreeing to a 5 per cent commission among real estate brokers, without anything else, is an unreasonable restraint of trade. Have you got any authority on that point?

• • •

764 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950-47

UNITED STATES OF AMERICA
PLAINTIFF

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and
WASHINGTON REAL ESTATE BOARD
DEFENDANTS

Washington, D. C.
Friday, June 4, 1948.

The above entitled action came on for further trial before the Honorable EDWARD M. CURRAN, Associate Justice, and a jury, at 11 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor H. Kramer, Trial Attorney.
Joseph P. Kelly, Jr.
Herbert N. Maletz,
C. Heyward Belser,
Attorneys, Department of Justice.

765 On behalf of the defendants:
Roger J. Whiteford,
John J. Wilson,
Jo V. Morgan, Jr.,
Attorneys for the National Association of Real Estate Boards.
William E. Leahy,
William J. Hughes, Jr.,
Attorneys for the Washington Real Estate Board.

* * *

766 PROCEEDINGS

The CLERK: The case of the National Association of Real Estate Boards and Washington Real Estate Board.

Opinion

The COURT: (CURRAN, *J.*) Last Tuesday and Wednesday there was argued before this Court two motions for judgments of acquittal; one made by the National Association of Real Estate Boards and one made by the Washington Real Estate Board, two co-defendants in this suit brought by the United States against the two defendants, in the form of an indictment, charging both of the defendants with

a conspiracy between themselves and co-conspirators not named, in violation of Section 3 of the Sherman Antitrust Law.

Authorities have been presented very capably by counsel on both sides in this matter, and have been of great assistance to the Court in coming to a conclusion.

As I see it, the question here is: What is the nature of the business of the defendants, that is, the National Association of Real Estate Boards and the Washington Real Estate Board and its members, and are the constitutions, the by-laws and the Codes of Ethics or any subdivision thereof, in their direct effect in restraint of trade or
767 commerce in the District of Columbia? Is the business of the defendants interstate commerce in the sense of that word as it has been used and understood by the decisions of the Courts, or is it a business which is an aid or facility to commerce and which, if it affects interstate commerce thereon in the District of Columbia, does so only in an indirect and incidental manner?

The facts of the matter are that the defendants, who are real estate men, have entered into voluntary associations for the purpose of bettering the conduct of their business, and after entering such associations they still continue their individual businesses in full competition with each other, and that the associations themselves, as associations, do no business whatever, but are simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold it in the proper way; and to create methods of preserving integrity amongst the members of the association.

In my view the charges of a real estate broker on account of his personal services are nothing more than charges for aids or facilities furnished to clients whereby their objects may be the more easily and readily accomplished. It is my view that charges or commissions of real estate brokers in the District of Columbia are based on personal
768 services performed for clients, and their effect in the sale of real estate are not directly connected with or form a part of interstate commerce in the District of Columbia, because I feel that charges for services of this character and nature do not immediately touch upon or act upon nor do they directly affect the sale of real estate in the District of Columbia.

Of course indirectly and as an incident they may enhance the cost to the owner of real estate, or they may add to the

price paid by the purchaser, but they are not, in my opinion, charges which are directly laid upon real estate itself. Rather are they charges for facilities given or provided to clients in the course of the sale of real estate.

Here in this case the conspiracy condemned by the statute is one whose direct and immediate effect is a restraint upon trade or commerce in the District of Columbia. As I say, charges for such facilities, in my opinion, are not restraints upon the trade or commerce, although, as I have indicated, the total cost of selling the real estate may be increased.

The right of the owners of real estate in the District of Columbia to sell their own property in any way whatever, is not affected or touched by the agreement in question, while the privilege of having their property sold for the real owner, with the aid of a broker, is a privilege which they are charged for and which is not
769 attached to their right to sell their own property.

If charges of the nature that I have mentioned do not amount to a regulation of interstate trade or commerce in the District of Columbia because they touch it only in an indirect or remote way, or else because they are in the nature of compensation for privileges as a facility for that trade or commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expense of those engaged in the business, yet as the agreements are in regard to compensation for privileges accorded for services rendered as a facility to commerce or trade, they are not unreasonable or illegal as a restraint thereon; and this is what, in brief, was enunciated by the Hopkins case in 171 U. S.

In other words, where the subject matter of the agreement does not relate to or act upon or embrace interstate commerce in the District of Columbia, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain commerce, but that it was entered into with the object of properly and fairly regulating the transactions of the business in which the parties to the agreement were engaged,
770 such agreements will be upheld, in my view, as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed and where the

effect of its formation and enforcement upon interstate trade or commerce in the District of Columbia is in any event but indirect and incidental and not its purpose or object, and so said the Supreme Court of the United States in the Anderson case, 171 U. S.

And I was particularly impressed by the language of the Court in the Duluth case, the Board of Trade case, in 107 Minn. 544 where it was said that when the legality of a particular act is to be tested by whether it violates general statutory prohibitions upon restraints of trade or commerce, Courts have given various reasons for their conclusions, and it seems that if any one thing may be said to be the test, it is the effect upon competition. Combinations are not *per se* illegal any more than are contracts or agreements generally, but when the purpose of either is to destroy competition in trade or commerce, the particular transaction falls within the prohibitions of the antitrust statute. It does not follow that every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumera-
771 ble ordinary business transactions which are unobjectionable and necessary that business shall not completely stagnate. Contracts and combinations which tend to promote business and which only remotely, incidentally and indirectly restrain competition are not forbidden. If the necessary effect of the combination is to stifle or to directly or necessarily restrict free competition it is under the ban of the law whatever may have been the intention of the parties. But if it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make it and operate it, then it is not a contract, combination or conspiracy in restraint of trade within the true interpretation of the Act.

My view of this case is that agreements to regulate the rate of commission to be paid for personal services to real estate brokers in the District of Columbia standing alone have never been held to be agreements in restraint of trade, and it is only when connected with other contracts or other conduct or other actions that they come within the purview of the Sherman law.

It is common knowledge that competition between real estate brokers is in fact strong, and success in getting the business depends not upon offering to transact for less than the uniform rate but upon the skill and facili-
772 ties possessed for obtaining the highest price for the property from the purchasers.

There is no fixed price at which sales of property must be made in the District of Columbia.

Says the Court in the Duluth case, it is inconceivable that an agreement which requires all real estate brokers who work on a commission basis and who are members of the Board, to charge the same rate of commission for the same service, can materially affect or control the price at which real estate sells, or at which the article sells. In the Duluth case the article was not real estate. I used that in my own language, paraphrasing the language of the Court in the Duluth case.

Of course in a remote and indirect way every charge and item of expense which attaches to the selling of real property affects to some extent the prices received by the owners and paid by the ultimate purchaser.

I have reviewed the cases and I cannot come to any other conclusion than that the Sherman law must have a reasonable construction or else there would be scarcely an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and with the possibility of a restraint thereon.

Counsel have conceded that in this case there must be an unreasonable restraint, but I am not convinced
773 that the mere fixing of a rate of commission for real estate brokers, for personal services rendered as an aid or facility to the owner of property in the District of Columbia, standing alone and with no other action or conduct, is *per se* an unreasonable restraint.

For these reasons and because of the authority that appeals to me in the Hopkins and Anderson cases, and in the Duluth case in Minnesota, the motions of the defendants for judgments of acquittal in this case are granted.

(Thereupon, at 11:30 o'clock a. m., the trial was concluded.)

Reporter's Certificate to foregoing transcript omitted in printing.

774 In United States District Court

Criminal No. 950-47

UNITED STATES

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and WASHINGTON REAL ESTATE BOARD N. G.

CHARGE: Vio. Sec. 3 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended.

Atty.: Roger J. Whiteford, John J. Wilson, William Leahy.

Date	*Court Clerk's Memorandum*	*Justice*
1947 Aug. 27	Presentment and Indictment filed.	
1947 Aug. 28	Each: Copy of Indictment served upon defendent.	
Sep. 4, 1947	Each: Arraigned, Plea Not Guilty. Defts.' given until 10-15-47 to file motions, etc. (J. Ward)	Bailey, J
4-28-1948	Ea.—Case con't to 5-24-48. Reported by N. J. Cinciotta.	Pine, J.
May 24, 1948	Ea.—Jury sworn on *voir dire*—jury sworn—Respited until tomorrow. Reported by Chloe MacReynolds.	Curran, J.
May 25, 1948	Ea.—Trial resumed—same jury—Respited until tomorrow morning. (MacReynolds and Rawls.)	Curran, J.
May 26, 1948	Ea.—Trial resumed—same jury—Respited until tomorrow morning. (MacReynolds and Rawls.)	Curran, J.
May 27, 1948	Ea.: Trial resumed—same jury—Respited until tomorrow morning. (MacReynolds and Rawls.)	Curran, J.
May 28, 1948	Ea.: Trial resumed—same jury—	
775	Respited until June 1/48. (MacReynolds—Rawls.)	Curran, J.
Jun. 1, 1948	Ea.: Trial resumed—same jury—Deft. #1—Motion for Judgt. of Acquittal argued and submitted. Deft. #2—Motion for Judgt. of Acquittal argued and continued 6/2/48. Respited until tomorrow morning. (MacReynolds and Rawls.)	Curran, J.

Jun. 2, 1948	Ea.: Trial resumed—(jury having been excused to return 6/4/48.) Deft. #2—Mot. for Judgt., hearing continued and submitted. Respited until 6/4/48. (MacReynolds and Rawls.)	Curran, J.
Jun. 4, 1948	Trial resumed—same jury—Ea.:Motion for Judgt. of Acquittal is by the Court—granted. Court directs Judgment of Acquittal as to each defendant—Jury dischgd. (Reported by Chloe MacReynolds.)	Curran, J.

776 In the District Court of the United States
For the District of Columbia
Holding a Criminal Term

G. J. No. .....

District of Columbia, to wit: July Term, A. D. 1947

Presentment—Filed Aug. 27, 1947

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do Present National Association of Real Estate Boards and Washington Real Estate Board

Violation: Section three of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended.

at the District aforesaid, on the 27th day of Aug., A. D. 1947.

BENJAMIN R. ORR
Foreman

777 In the District Court of the United States
For the District of Columbia

(File Endorsement Omitted)

Criminal Action No. 950-47

UNITED STATES OF AMERICA
PLAINTIFF

v.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and
WASHINGTON REAL ESTATE BOARD
DEFENDANTS

Indictment—Filed Aug. 27, 1947

The Grand Jury charges:

DEFENDANTS

1. National Association of Real Estate Boards (hereinafter referred to as "National Association") is hereby indicted and made a defendant herein. National Association is a corporation organized in 1908 and existing by virtue of the laws of the State of Illinois. It transacts business and is found in the District of Columbia. It is a national trade association comprised of (1) approximately 28,000 real estate brokers and others affiliated with the real estate business throughout the United States including the the District of Columbia, and (2) approximately 800 local associations of real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia.

2. Washington Real Estate Board (hereinafter referred to as "Washington Board") is hereby indicted and made a defendant herein. Washington Board is a corporation organized in 1928 and existing by virtue of the laws of the District of Columbia. It is a successor to an unincorporated association of real estate brokers known as Real Estate Brokers Association of Washington City, D. C., organized in the District of Columbia in 1913. Said Washington Board is a trade association with a membership
778 consisting of approximately 250 real estate brokers and others affiliated with the real estate business, including several banks, building and loan associations, life insurance companies, and title companies, all doing business in the District of Columbia. Washington Board and all members thereof are members of the National Association.

3. The acts alleged in this indictment to have been done by each of the defendant corporations were authorized, ordered or done by the officers and directors of each of said corporations.

4. Various persons not made defendants herein participated as co-conspirators with the defendants in the offenses hereinafter charged, and performed acts and made statements in furtherance of the effectuation thereof. These co-conspirators include (a) those who have been officers and members of the Washington Board and individuals who, from time to time, acted as the representatives of the members in meetings and other activities of the Washington Board, and (b) those who have been officers, directors and members of committees of the National Association.

NATURE OF TRADE AND COMMERCE

5. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia.

6. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.

779 7. Due to the transient nature of a large percentage of the population of the District of Columbia, a particular parcel of real estate or apartment may be sold, leased, or rented by a broker to a great number of purchasers, lessees or tenants within a short period of time. A brokerage commission or fee is realized from each such sale or lease.

8. Under present market conditions the demand for residential and commercial properties in the District of Columbia is greater than the available supply. Purchasers or tenants are readily available to brokers acting as agents for the sale or rental of residential and commercial properties in the District of Columbia. The compensation of said brokers is in the form of a commission determined by a percentage of the sales or rental price regardless of the nature and amount of services rendered by said brokers.

OFFENSES CHARGED

9. For many years up to and including the date of the return of this indictment, the defendants and their co-conspirators have been engaged in a combination and con-

spiracy to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property and the improvements thereon, all in violation of Section 3 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act; that is to say:

10. The defendants and their co-conspirators have agreed upon and fixed rates of commission to be charged by the members of the defendant corporations in the District of Columbia for acting as agents in the sale, exchange, lease and management of real property and the improvements thereon.

780 11. The aforesaid combination and conspiracy, and the acts, agreements and understandings which formed a part of and were used in effectuation thereof, have been carried out by divers means and methods including those hereinafter described.

A. Commission Rate Fixing Generally

12. For many years prior to January 1, 1947 the National Association had a Committee on Rates, Rules and Customs. One of the purposes of said Committee was to raise brokerage commission rates and achieve uniformity in said rates throughout the United States including the District of Columbia. Said Committee made studies of brokerage commission rates prevailing in various States of the United States and in the District of Columbia, and thereafter initiated a plan to raise rates of commission charged by various members of the National Association throughout the United States, including those doing business in the District of Columbia, and to achieve uniformity in those rates.

13. In accordance with the recommendations of the National Association, the Washington Board, as hereinafter set forth, increased the rates established in its schedule of commissions.

14. Members of the Washington Board agree as a condition of membership in the National Association to abide by the Code of Ethics of the National Association. Article 9 of this Code requires each member of each local real estate board, including the Washington Board, to observe the schedule of commissions established by the local board of which each is a member.

15. Article 14 of the Constitution and By-Laws of the Washington Board provides that said Board may adopt

specific rules of practice or "ethics" and that any such rules, when adopted, are binding on each member. In accordance with this provision, the Washington Board has adopted a schedule of commissions which fixes the
781 standard rates of commissions to be charged by its members for acting as agents in the sale, exchange, lease and management of real property in the District of Columbia.

16. Section 3 of the Code of Ethics of the Washington Board provides:

> Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates.

All members of the Washington Board agree and have agreed as a condition of membership to abide by this Code of Ethics, and in accordance therewith, said members adhered to the schedule of commissions established by the Washington Board.

17. On February 16, 1943 the schedule of commissions, which had been in effect for several years, was revised by the Washington Board and the members thereof agreed to adhere and have generally adhered to the new schedule. This revised schedule substantially increased the commission rates required to be charged by the members of said Washington Board.

B. Commission Rate Fixing of Sales of Real Estate

18. The schedule of commissions of the Washington Board which had been in effect prior to February 16, 1943 required each of its members, when acting as agent in the sale of real estate in the Washington city area, which included most of the District of Columbia, to charge a rate of commission of 5% on the first $5,000 of the sales price, and an additional 3% on the excess above $5,000.

19. On February 16, 1943 a new schedule increasing these rates was approved at a special meeting of the Washington Board. This schedule provided in part as follows:

> The commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000 and 3% on the excess above $50,000.

782 20. In addition to the provisions in the schedule fixing rates of commission on sales of real estate, the Washington Board issues a standard form sales contract which is generally used by real estate brokers in the District of Columbia. This contract contains the following provisions with respect to rates of commission:

The seller agrees to pay to Agent the regular rate of commission fixed by the Washington Real Estate Board.

C. Commission Rate Fixing on Exchanges of Real Estate

21. For several years prior to February 16, 1943 the schedule of commissions adopted by the Washington Board required its members, when acting as agents in the exchange of real property in the city area of the District of Columbia, to charge each owner a rate of commission of 2½% of the exchange price of the lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 3%.

22. The new schedule which was approved on February 16, 1943 provided in part as follows:

> In the exchange of real estate within the District of Columbia, a commission shall be charged each owner, at the rate of 2½% of the exchange price of lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 5% up to and including $50,000 and 3% for the amount above $50,000 if located within the District of Columbia.

D. Commission Rate Fixing of Leases

23. The schedule of commissions adopted by the Washington Board in or about 1931 fixed the rate of commission to be charged by a member broker for securing a tenant or negotiating a lease for business properties, where the broker did not collect the rent or manage the property, at one half of the first month's rent if the term of the lease was less than two years, and at 2½% of the gross total rent for the entire term of the lease for leases of two years or longer. Where the lease was in excess of twenty-one years, the rate of commission was fixed at 2½% of the gross rental for the first twenty-one years, 1% for the next twenty-one years, and ¼% for any additional period. The commission for the sale of a lease was fixed at 10% on the first $50,000 and 5% on the balance. This schedule of commissions further fixed the rate of commission for securing a tenant or negotiating a lease for residential properties, where the broker did not collect the rent or manage the property, at one half of the first month's rent where the term of the lease was less than two years, and 2½% of the gross total rent for the entire term where the lease was two years or longer.

783

24. The schedule of commissions of the Washington Board now in effect fixes the following rates of commission to be charged by a member broker for securing a tenant or negotiating a lease for business properties where the broker does not collect the rent or manage the property:

1. Monthly tenancy: One-half of first month's rent.
2. Leases: One year: 5%.
3. Leases: Term

First year	5%
Next 20 years	2½%
Next 21 years	1%
Next 21 years	½%
Any period beyond 21 years	¼%

Said schedule of commissions now in effect fixes the following commission rates with respect to percentage leases:

5. Percentage leases: With minimum guarantee the commission shall be 5% for the first year and 2½% of the minimum rental for the next 20 years of the lease, payable at time lease is signed. In event lessee pays additional rentals over and above minimum guaranteed rental, the broker shall at the time of payment of such rentals be entitled to additional commissions of 5% of amount collected.

Without minimum guarantee the commission shall be 5% of the total rentals for the full term of the lease payable at the time of payment of such rentals.

784 Said schedule fixes the rate of commission for the sale of a lease of a business at 10% on the first $50,000 and 5% on the excess over $50,000. Said schedule of commissions fixes the rates for securing a tenant or negotiating a lease for residential properties, where the member broker does not collect the rent or manage the property, at one-half of the first month's rent for a monthly tenancy or lease for one year, and for a lease exceeding one year at 5% for the first year and thereafter 2½% of the gross rent for the balance of the term of the lease.

E. Commission Rate Fixing on Management of Real Estate

25. The schedule of commissions fixes the rate of commission for collection of rents and management of commercial and residential properties as follows:

The commission for collection of rents and management of property shall be 5% of the gross rent, payable as collected, for all classes of property up to $100,000.00 annually. This provision shall apply not only to the

original lease but to any extensions or renewals thereof, or where the lessee remains in possession beyond the term of the original lease.

On an individual building or project where the gross annual rental exceeds $100,000.00 commission on the excess shall be subject to agreement.

Minimum commission on all rentals under $20 per month shall be $1.00.

EFFECTS OF OFFENSES CHARGED

26. The aforesaid combination and conspiracy, agreements, understandings and concert of action hereinbefore alleged, have had, as intended by the defendants, the following effects:

(a) Competition between members of the defendants in determining fees to be charged for selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia has been eliminated.

(b) The amounts paid for commissions to brokers for the sale of houses in a large part of the District of Columbia have increased 25% to 50%.

785 (c) The activities and business policies of real estate brokers engaged in selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia have been actively and effectively restricted and dominated.

JURISDICTION AND VENUE

27. The combination and conspiracy, hereinbefore alleged, has operated and has been carried out, in large part, within the District of Columbia. Within the applicable period of the statute of limitations, in effectuating and carrying on said combination and conspiracy, defendant Washington Board within the District of Columbia has held meetings at which rates of commission have been fixed and agreed upon.

A True Bill.
BENJAMIN R. ORR
Foreman

Dated: Aug. 27th, 1947.

JOHN F. SONNETT
Assistant Attorney General

VICTOR H. KRAMER
HERBERT N. MALETZ
Special Assistants to the Attorney General

GEORGE MORRIS FAY
United States Attorney

786 *Praecipe Entering Appearance—Filed Sept. 4, 1947*

In the District Court of the United States
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

The Clerk of said Court will please enter our appearance for the defendant, National Association of Real Estate Boards.

ROGER J. WHITEFORD
Roger J. Whiteford

JOHN J. WILSON
John J. Wilson

Address 815-15th Street, N. W., Wash. D. C.
Attorneys for Defendant, NAREB

Of Counsel:
WHITEFORD, HART, CARMODY & WILSON
815-15th Street, N. W.

787 *Praecipe Entering Appearance—Sept. 4, 1947*

In the District Court of the United States
For the District of Columbia

The Clerk of said Court will enter my appearance for the Defendant, the Washington Real Estate Bd.

WILLIAM E. LEAHY
Address Bonen Bldg. Tel. Di 0558
Attorney for Def. Wash. Real Est. Bd.

820 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950–47

(Title Omitted)

(File Endorsement Omitted)

Stipulation of Authenticity and Genuineness and for Use of Copies of Documents—Filed May 24, 1948

1. United States of America and the defendants National Association of Real Estate Boards and Washington Real Estate Board, by their respective attorneys, hereby stipu-

late and agree that if, at the trial of this case, any one or more of the documents, or photostatic or typewritten copies thereof, specified in Exhibit A hereto attached are offered in evidence by any of the parties hereto, none of the parties hereto will object to the admission thereof in evidence for the lack of proof of genuineness or authenticity or on the ground that the document is a copy instead of an original; but it is expressly understood and agreed that each party hereto observes every right to object to the admission in evidence of each and all of said documents, or any part or parts thereof, on grounds of irrelevancy, immateriality, incompetency, privilege, and every other ground of objection whatsoever, save only as to the genuineness and authenticity of said documents or copies as above stated. Nothing herein shall prevent defendant National Association of Real Estate Boards or defendant Washington Real Estate Board from introducing additional evidence in explanation of, or supplementing or contradicting such documents, or any of them, or any matters therein referred to.

Any of said specified documents, if admitted in
821 evidence in this case, shall be deemed for the purpose of this case to be genuine and authentic.

2. None of the parties hereto, by entering into this stipulation, shall be deemed to have made any admission of fact or of facts, or of the genuiness or authenticity of any document for the purpose of any other or different suit or proceeding to which any of the parties hereto may be parties, regardless of whether such suit or proceeding is between the parties hereto or between any one or two of the parties hereto and any other person or persons.

3. The parties hereto further stipulate and agree that photostatic copies of any and all documents may be introduced and may be offered in evidence in lieu of the originals thereof; none of the parties hereto will object to the admission of said photostatic copies in evidence on the ground that the document is a copy instead of an original.

Dated this 12th day of May, 1948.

WM. J. HUGHES, JR.
Attorney for Defendant Washington Real Estate Board

VICTOR H. KRAMER
Attorney for United States

J. J. WILSON
Attorney for Defendant National Association of Real Estate Boards

822 *Exhibit "A" to Stipulation*

1. Roster of Washington Real Estate Board (designated hereafter as WREB):
2. Constitution and By-Laws of WREB.
3. Code of Ethics of WREB.
4. Application for Admission as Active Member in WREB.
5. Constitution & By-Laws, Code of Ethics, Schedule of Commissions WREB, October 1, 1931.
6. Schedule of Commissions—WREB—December 19, 1944.
7. Lines Dividing 5% Commission Zone from 5 and 3%—October 1, 1934.
8. Minutes of Board of Directors of WREB—January 20, 1943.
9. Minutes of Special Meeting of WREB—February 16, 1943.
10. Minutes of Board of Directors of WREB—February 17, 1943.
11. Speech of Claude Livingston, President of WREB—September 27, 1943.
12. Minutes of Board of Directors of WREB—March 15, 1939.
13. Minutes of Board of Directors of WREB—May 17, 1939.
14. Application for Membership (Form)—WREB.
15. Roster of WREB—February, 1947.
16. Roster—New Members.
17. WREB Application for Membership, and "Realtor"—its meaning and use.
18. Advertisement of WREB—"All realtors are real estate men *but* not all real estate men are realtors".
19. WREB—Report of President—October 14, 1935.
20. WREB—Report of President—1944-1945.
21. Special Notice to All Active Members WREB—January 22, 1943.
22. List of Officers and Directors of WREB—1940-1947 inclusive.
23. Sales Contract—Official Standard Form adopted by WREB.
24. Special Notice to Active Members—WREB—December 20, 1944.
25. Special Notice to Active Members—WREB—December 5, 1944. (Commission & Charges Schedule Attached)
26. Notice to Members of Sub-Committee on Sales and Exchanges. WREB—August 8, 1934.

27. Minutes of Executive Committee—WREB—October 8, 1930.

823 28. Minutes of Board of Directors—WREB—October 22, 1930.

29. Minutes of Board of Directors—WREB—July 15, 1931.

30. Minutes of Board of Directors—WREB—August 19, 1931.

31. Minutes of Board of Directors—WREB—July 26, 1932.

32. Minutes of Board of Directors—WREB—August 10, 1932.

33. Minutes of Board of Directors—WREB—September 25, 1934.

34. Minutes of Board of Directors—WREB—June 19, 1935.

35. Minutes of Board of Directors—WREB—November 16, 1938.

36. Minutes of Board of Directors—WREB—December 14, 1938.

37. Minutes of Board of Directors—WREB—February 27, 1939.

38. Minutes of Board of Directors—WREB—June 18, 1941.

39. Special Notice to Active Members—WREB—July 7, 1944.

40. Memorandum of Meeting of Commission Study Committee—WREB—Nov. 1, 1944.

41. Memorandum of Meeting of Commission Study Committee—WREB—Mar. 8, 1939.

42. Memorandum of Meeting of Commission Study Committee—WREB—Feb. 10, 1939.

43. Memorandum of Meeting of Commission Study Committee—WREB—Jan. 27, 1939.

44. Memorandum of Meeting of Commission Study Committee—WREB—Dec. 14, 1938.

45. WREB—News—December, 1945.

46. Report of Mr. Middleton, Chairman of Sub-Committee on Appraisals.

47. Minutes of meetings of Board of Directors—WREB—1940.

48. Minutes of meetings of Board of Directors—WREB—1941.

49. Minutes of meetings of Board of Directors—WREB—1942

50. Minutes of Meetings of Commission Study Committee—WREB—1940.

51. Minutes of Meetings of Commission Study Committee —WREB—1941.
52. Minutes of Meetings of Commission Study Committee —WREB—1942.

824 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950-47

(Title Omitted)

(File Endorsement Omitted)

Stipulation of Authenticity and Genuineness and for Use of Copies of Documents—Filed May 24, 1948

1. United States of America and the defendants National Association of Real Estate Boards and Washington Real Estate Board, by their respective attorneys, hereby stipulate and agree that if, at the trial of this case, any one or more of the documents, or photostatic or typewritten copies thereof, specified in Exhibit A hereto attached are offered in evidence by any of the parties hereto, none of the parties hereto will object to the admission thereof in evidence for the lack of proof of genuineness or authenticity or on the ground that the document is a copy instead of an original; but it is expressly understood and agreed that each party hereto observes every right to object to the admission in evidence of each and all of said documents, or any part or parts thereof, on grounds of irrelevancy, immateriality, incompetency, privilege, and every other ground of objection whatsoever, save only as to the genuineness and authenticity of said documents or copies as above stated. Nothing herein shall prevent defendant National Association of Real Estate Boards or defendant Washington Real Estate Board from introducing additional evidence in explanation of, or supplementing or contradicting such documents, or any of them, or any matters therein referred to. Any of
825 said specified documents, if admitted in evidence in this case, shall be deemed for the purpose of this case to be genuine and authentic.

2. None of the parties hereto, by entering into this stipulation, shall be deemed to have made any admission of fact or of facts, or of the genuineness or authenticity of any document for the purpose of any other or different suit or proceeding to which any of the parties hereto may be parties, regardless of whether such suit or proceeding is between the parties hereto or between any one or two of the parties hereto and any other person or persons.

3. The parties hereto further stipulate and agree that photostatic copies of any and all documents may be introduced and may be offered in evidence in lieu of the originals thereof; none of the parties hereto will object to the admission of said photostatic copies in evidence on the ground that the document is a copy instead of an original.

Dated this 12 day of May, 1948.

WILLIAM J. HUGHES, JR
Attorney for Defendant Washington Real Estate Board

VICTOR H. KRAMER
Attorney for United States

JO V. MORGAN, JR
Attorney for Defendant National Association of Real Estate Boards

826 *Exhibit "A" to stipulation*

1. Constitution and By-laws, National Association of Real Estate Boards (designated hereafter as NAREB).
2. Code of Ethics of NAREB.
3. Progress Report of Committee on Rates, Rules and Customs—NAREB.
4. Guide on Rates, Rules and Customs—NAREB.
5. Letter from Arthur S. Kirk to Thomas P. Abbott—April 25, 1945.
6. Facts about the NAREB—Memorandum for Vice-Presidents—January 1942.
7. Summary of Findings on Real Estate Brokerage Commission Rates of Local Boards—NAREB.
8. Minutes of National Convention—NAREB—1939.
9. Minutes of National Convention—NAREB—1940.
10. Minutes of National Convention—NAREB—1941.
11. Minutes of National Convention—NAREB—1942.

832 In the District Court of the United States
For the District of Columbia

Criminal Action No. 950-47

(Title Omitted)

(File Endorsement Omitted)

Stipulation as to certain facts—Filed May 26, 1948

1. United States of America and the defendants Washington Real Estate Board and National Association of Real Estate Boards, by their attorneys respectively, hereby stipulate and agree that at all times from the formation of the

Washington Real Estate Board in 1928 until the date of the return of the indictment in this case (a) the members of the defendant Washington Real Estate Board have been engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia and during said period these members have handled a substantial proportion of the said business and (b) real estate brokers in the District of Columbia who have not been members of the defendant Washington Real Estate Board have been engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia and have likewise throughout said period handled a substantial proportion of the said business.

2. The right is expressly reserved to any parties to object on any and all grounds to the admission in evidence of any fact stipulated herein.

3. None of the parties hereto, by entering into this
833 stipulation, shall be deemed to have made any admission of fact or facts for the purposes of any other or different suit or proceeding to which any one or more of the parties hereto may be parties, regardless of whether such suit or proceeding is between two or more of the parties hereto or between one of the parties hereto and any other person or persons.

VICTOR H. KRAMER
Attorney for the United States

JO V. MORGAN, JR
Attorney for the Defendant
National Association of Real Estate Boards

WM. J. HUGHES, JR
Attorney for the Defendant
Washington Real Estate Board

Dated May 13, 1948

872 In the District Court of the United States
For the District of Columbia

Criminal No. 950-47

(Title Omitted)

(File Endorsement Omitted)

Motion of Defendant National Association of Real Estate Boards for Judgment of Acquittal—Filed June 1, 1948

The National Association of Real Estate Boards moves for a judgment of acquittal on the ground that no substan-

tial evidence has been adduced against the said defendant upon which a reasonable mind could infer guilt beyond a reasonable doubt.

The National Association of Real Estate Boards makes the same Motion on the ground that there has been no showing of any violation of the Sherman Act. In this latter aspect, the Motion is in the nature of a demurrer to the evidence.

ROGER J. WHITEFORD
Roger J. Whiteford
815—15th St., N. W.
Washington, D. C.
Attorney for Defendant
National Association

Memorandum of Points and Authorities in Support of Motion

First ground above: *Curley v. United States*, 81 App. D. C. 389, 392, 160 F. 2d 229.

Second ground above: *United States v. U. S. Gypsum Co.*, 51 F. Supp. 613, 633

ROGER J. WHITEFORD
Roger J. Whiteford

I certify that I served the above motion and memorandum upon the attorneys for the United States and for the defendant Washington Real Estate Board by handing them copies thereof in open court.

ROGER J. WHITEFORD
Roger J. Whiteford

874 In the District Court of the United States
For the District of Columbia

Criminal No. 950-47

Friday, June 4, 1948

Minute Entry.

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited in this case yesterday; and thereupon the defendant's motion for judgment of acquittal, as to each defendant, is by the Court granted; and thereupon the jury is discharged from further consideration in this case.

The Court is adjourned until Monday morning at ten A. M.

1001 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

UNITED STATES OF AMERICA
PLAINTIFF
v.
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, *et al.*
DEFENDANTS

Reporter's Transcripts of Proceedings

Washington, D. C.
Wednesday, June 16, 1948

* * *

1021 *Colloquy*

THE COURT: Something was said by counsel for the Government to the effect that the defendants, or some of them, one of them, he thought had preliminary motions which, if they were disposed of, might be of some assistance in disposing of the case finally and of enabling it to be reached with more promptness even though it isn't advanced.

Have you anything to say about that, gentlemen?

1022 MR. LEAHY: Yes, your Honor, because we already had been preparing to file an amended answer with the leave of court, setting up *res adjudicata* as to the facts and, further, setting up what will have been accomplished in the next week or ten days so far as the Washington Board is concerned, and after we had filed that amended answer, we were going to ask for a judgment on the pleadings.

THE COURT: Are you in a position to do that promptly?

MR. LEAHY: We are in a position to do it. We would have done it only this motion was thrown at us three hours after the verdict came in.

We can do it.

THE COURT: So that that particular motion can be heard before the summer recess?

MR. LEAHY: Yes, your Honor. We can get that answer in, with leave of court. We can get the answer in and have the argument on a motion for judgment on the pleadings.

MR. KRAMER: If the Court please, if counsel for National will say the same thing, I will withdraw the motion for advancement.

MR. WHITEFORD: Yes, your Honor, we are going to file that motion. We prepared our motions in the criminal case with that thought in mind.

The Court: Well, within how long do you think you could file it?

1023 Mr. Whiteford: Within a week or so.

Mr. Leahy: I will give your Honor the reason why we say a week.

The Court: Gentlemen, I will be sitting until the 16th of July. Miss Jobe says we have a full calendar until the first of July. I am not supposed to take anything but emergency matters, but if counsel would like it done, I can hear that motion at any time that is suitable to counsel between the first and 16th of July.

Mr. Leahy: Very well, your Honor.

Mr. Whiteford: Very well.

The Court: Is that all right, gentlemen?

Mr. Kramer: Entirely satisfactory, so long as we can get the motion out of the way.

The Court: All right, gentlemen. This motion to advance is overruled.

(Whereupon, at 10:30 o'clock a. m., the hearing on the motion was concluded.)

1092 In the United States District Court
For the District of Columbia
Civil Action No. 3472–47
(Title Omitted)

Washington, D. C.,
Tuesday, November 9, 1948.

The above-entitled action came on for hearing before the Honorable Alexander Holtzoff, Associate Judge, at 10:00 o'clock a. m.

APPEARANCES:

On behalf of the United States:
Victor H. Kramer, Esq.,
Herman N. Maletz, Esq., and
C. Heyward Belser, Esq.,
Attorneys, Department of Justice.

On behalf of the Defendants:
Whiteford, Hart, Carmody & Wilson,
By Roger J. Whiteford, Esq.,
Attorneys for the National Association of Real Estate Boards.

1093 William E. Leahy, Esq.,
Attorney for the Washington Real Estate Board.

• • •

1094 *Colloquy*

The COURT: Gentlemen, the Court wishes to make a suggestion as to future proceedings in the case of United States against The Real Estate Board.

The criminal case has been tried in full. It took, I believe, a couple of weeks to try. It has been disposed of. The civil case is now pending. It is the Court's understanding that the issues in the two cases are the same. It may be there is a difference in the degree of proof required but the issues are the same.

The Court surmises and assumes that the reason the civil case is being prosecuted is that the government cannot appeal from the direction of a verdict in a criminal case and can secure a review in a civil case.

The Court, therefore, wishes to make the suggestion that when the time comes this case be submitted on the record made in the criminal case and that no further testimony be taken. That, of course, will obviate any discovery proceedings and that is the reason the Court wants to make the suggestion at this stage without waiting until after the special appeal is disposed of. It will save the time of the Court of having to hear the testimony all over again and also save the expense and burden to the parties and I think it will serve the end of justice.

1095 The Court will be glad to hear if that suggestion is agreeable.

Mr. KRAMER: Of course, the suggestion is agreeable to the government but I am afraid, since the defense never had an opportunity to put their defense in, it would not be agreeable to them.

The COURT: The Court's suggestion would not preclude the defense putting in additional evidence but I rather assume that there isn't any serious dispute as to the facts. The only dispute is as to whether the facts constitute an unlawful restraint of trade so perhaps the defense might be willing to submit on the evidence before the Court, especially in view of the fact it got a directed verdict on that evidence.

However, Mr. Kramer, all I want you to do is to speak for yourself. Is this agreeable to the government?

Mr. KRAMER: It would be agreeable to the government if it were agreeable to the defense also, yes.

The COURT: I can only take one at a time. Is it agreeable to you—to the government?

Mr. KRAMER: My colleague points out that Judge Curran refused to allow certain documents to be admitted.

The COURT: What did you say?

Mr. KRAMER: Certain documents were excluded but so long as they could be marked and become a part of the record, all I would do is reoffer them.

1096 The COURT: Do you want time to consider this or do you wish to state your view now?

Mr. WHITEFORD: I think I do want to state my view now. It is such a happy suggestion. I suppose that I should talk to my client about it but, personally, I think it is the ideal way to handle it and I am very much in favor of it as far as the National Association is concerned.

The COURT: Then I suggest that we have a stipulation and it can be oral if it is put on the record.

IT IS STIPULATED by all parties that when the case of UNITED STATES OF AMERICA vs. NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, *et al.*, Civil Action No. 3472–47, is called for trial it will be submitted to the Court on the record made in Criminal Action No. 750–47.

That, of course, will do away with all pending discovery proceedings.

Mr. KRAMER: If the Court please, it is agreeable if your Honor can assist me in one difficulty since this is pretty novel to me. Will the government have the opportunity to have included in the record of the case those documents that were offered and not admitted?

The COURT: Is that agreeable?

Mr. WHITEFORD: The criminal case was decided
1097 upon the record there made which excluded those documents. In other words, Mr. Kramer would want to argue all those questions of evidence again and their admissibility. We did not think they were admissible and Judge Curran sustained our objections.

The COURT: Judge Curran ruled those documents out and, of course, if you make such a stipulation you will have to—

Mr. WHITEFORD: Take the record as he made it.

The COURT: Yes.

Mr. KRAMER: My thought was I want that part of the record so in the event, which we think unlikely, that this Court should rule against the government and there should be an ensuing appeal we could have those documents printed for the Supreme Court. I am asking that they be available for printing on appeal to the Supreme Court.

The COURT: Let's see if we understand each other. If you want to present them to the Court of Appeals you will have to get a ruling first from the Trial Judge because it

would not be fair for the Trial Judge not to have the opportunity to rule on these documents.

Mr. KRAMER: My thought was we would not introduce any more testimony. We would call no witnesses but we would have everything that happened before Judge Curran before the Trial Judge in this case to rule on as he sees fit; in other words, not only as to final judgment but also as to the admissibility of the evidence.

1098 The COURT: What do you say about that, Mr. Whiteford?

Mr. WHITEFORD: Let me point out to your Honor something that might arise in that regard. I am perfectly willing, as I stand here and think about that record, to have the civil case decided upon the record as made in the criminal case and it has been stated that we did not put any testimony in in the criminal case. Now, if this record should come before your Honor sitting in the equity side of the Court, so to speak—

The COURT: It would not necessarily come before me.

Mr. WHITEFORD: No, sir; but I am using this as an illustration and if Mr. Kramer's position is, if we should stipulate to it—he offered in evidence 44 exhibits out of the minute books and one thing and another that Judge Curran refused to accept—that he wants the privilege of reoffering those and having a new ruling in the civil case.

If that were presented to your Honor and you felt that evidence ought to be in the record, then we have stipulated nothing in and I would have no way under that stipulation then to put any testimony in. I am willing to do this: I am willing to stipulate that if he is to offer these records again and if the Trial Judge disagrees with Judge Curran's ruling and admits them, I am to have the opportunity then to answer because I certainly would not want to be left—

The COURT: I think that is fair. Is there any ob-
1099 jection to that?

Mr. KRAMER: No; we want the Court to hear the whole defense.

The COURT: Very well.

IT IS FURTHER STIPULATED that the plaintiff may reoffer at the trial of the civil action those exhibits which were offered at the trial of the criminal case and were excluded and if they are admitted at the trial of the civil suit then the defendants shall have the privilege of offering such evidence as they may deem advisable for the purpose of answering or rebutting the exhibits.

Mr. WHITEFORD: I agree to that

The COURT: Is that stipulation agreeable to you, Mr. Kramer?

Mr. KRAMER: It is entirely satisfactory to the government, yes.

The COURT: It is satisfactory to the government and it is satisfactory to the defendants?

Mr. WHITEFORD: It is to me and I am speaking for the National Association.

The COURT: Mr. Leahy, is it satisfactory to you?

Mr. LEAHY: Yes.

The COURT: It is satisfactory to the government and to the defendants. Then, of course, it obviates pend-
1100 ing discovery proceedings and they are unnecessary so far as the plaintiff is concerned.

Mr. KRAMER: That is right.

(Thereupon, at 10:15 o'clock a. m. the hearing was concluded.)

* * *

Reporter's Certificate to foregoing transcript omitted in printing.

1102 United States District Court
For the District of Columbia

Civil Action No. 3473-47

(Title Omitted)

Washington, D. C.
Monday, June 27, 1949

The trial of this case was begun before District Judge Alexander Holtzoff at 10 a. m.

APPEARANCES:

On behalf of the United States of America:
Mr. Victor H. Kramer,
Mr. Herbert N. Maletz, and
Mr. C. Heyward Belser.

On behalf of National Association of Real Estate Boards and Herbert U. Nelson:
Mr. Roger J. Whiteford and
Mr. Jo V. Morgan, Jr.

Defendants other than Herbert U. Nelson:

On behalf of Washington Real Estate Board and Individual
Mr. William E. Leahy and
Mr. William J. Hughes.

On behalf of J. Hawley Smith:
Mr. A. K. Shipe.

1104 PROCEEDINGS

The DEPUTY CLERK: The case of the United States vs. National Association of Real Estate Boards and others, Civil Action No. 3472-47.

Colloquy

The COURT: Before we start, gentlemen, I want to say that I have read the transcript of the evidence taken in the criminal case. I have examined the exhibits offered in evidence. So perhaps it may simplify your work in making the final arguments to know that I have read the evidence and you may assume that I have done so.

Mr. KRAMER: If the Court please, I should like to take this opportunity to introduce to you my two associates.

This is Mr. Herbert N. Maletz, of the Massachusetts Bar.

This is Mr. C. Heyward Belser, of the District of Columbia Bar.

The COURT: Your associate from the District of Columbia Bar does not have to be admitted, but I will admit Mr. Maletz *pro hac vice*.

Mr. KRAMER: If your Honor has no objection, the Government would like to suggest the following method of procedure this morning:

Mr. Maletz would make a brief, succinct statement of those facts which we think are substantially shown by the transcript. Then Mr. Belser would move the admission of certain exhibits heretofore excluded—

1105 The COURT: There is no such thing as moving the admission of evidence. Exhibits are offered in evidence. I notice that that phrase has been used throughout the transcript. It is not a technically correct phrase.

Mr. KRAMER: We would again offer in evidence the exhibits that were excluded.

The COURT: I think it would be better if you would offer whatever exhibits you wish to offer at the beginning of the argument; then the argument commences.

Mr. KRAMER: Is your Honor agreeable to hearing a statement as to why we think the exhibits should be admitted at the time of offering them?

The COURT: Suppose you finish your suggestion as to the mode of procedure.

Mr. KRAMER: That is all I was going to say, your Honor. The Government would then rest.

The COURT: Then, make your offer.

Mr. KRAMER: The Government offers in evidence Government Exhibits 15, 16, 22, 27, 29, 30, 32 to 38, inclusive, 40, and 42.

The COURT: I think different principles may attach to different exhibits. Suppose we take them one at a time. What is the first one?

Mr. KRAMER: If the Court please, we think the exhibits fall into three groups.

1106 The COURT: I know. Suppose you take each exhibit separately.

Mr. KRAMER: I suggest we first take up Exhibits 29 and 30.

The COURT: No. Take them in numerical order, the order in which they are to be offered. What is the first exhibit?

Mr. KRAMER: The first exhibit in numerical order is Government Exhibit 15.

The COURT: We can use individual exhibits to formulate principles which may apply to other exhibits.

Mr. KRAMER: Excuse me, your Honor. Government Exhibits 12 and 15 are the first two in numerical order.

The COURT: Exhibit 12 is the first?

Mr. KRAMER: That is right, your Honor.

The COURT: Suppose we start with No. 12. Is there any objection to the admission of this exhibit?

Mr. LEAHY: The same objection that we offered at the trial of the criminal case, if your Honor please: that they simply show nothing ever having been done by either of the leaders—

The COURT: That goes to the probative value, of course, rather than to the admissibility. This being an equity case, perhaps a greater liberality of admissibility of exhibits should prevail. Then the Court, of course, can at-

1107 tach such probative value as they may have in weighing the exhibits.

Mr. LEAHY: I was wondering, if your Honor please, if we could not apply a short cut to all this business. This is an equity case, and your Honor is sitting as a chancellor. We have noted our objections. We do not care. You may go ahead and consider them.

The COURT: Suppose we make all these exhibits a part of the record. Then I will, in weighing them, attach such weight to each of them as it is entitled to under the rules of evidence. For example, I think a letter written by a defendant is admissible as against that defendant; I do not think it is admissible as against any other defendant.

I have the Government's memorandum on that question. I think Government counsel overlook one thing. It is true that an admission of a co-conspirator is admissible against co-conspirators, but you first have to establish the conspiracy. You cannot without the admission offer the denials for the purpose of establishing conspiracy. I think some of these letters containing admissions are subject to that limitation. They are admissible only as against the defendant who made the admission. But I think I can take care of that in weighing the evidence. So all these exhibits will be considered and admitted as part of the record.

Mr. KRAMER: If the Court please, with that, the Government rests, and we await further action, upon hearing from the defendants whether or not they propose under the stipulation to introduce evidence to rebut any of these exhibits your Honor has admitted. They reserved that right.

1108

The COURT: You do not have to reserve the right to rebut. That goes without saying. Do you rest?

Mr. KRAMER: We rest, your Honor.

Mr. WHITEFORD: If your Honor please, as I understand it, under Mr. Leahy's suggestion, all of these exhibits are received in evidence, subject to the exception that there is in the record with respect to them, so far as the two defendants are concerned to whom they apply. I am very well satisfied with that, and so far as the National Association of Real Estate Brokers and Mr. Herbert Nelson are concerned, we shall offer no testimony in rebuttal.

The COURT: Mr. Leahy?

Mr. LEAHY: So far as the Washington Real Estate Board and all of the defendants save and except J. Hawley Smith, we will stand on the record as is.

I believe Mr. Shipe is in court now, so he can speak for Mr. Smith, and that will clear the record.

Mr. SHIPE: I take the same position, with respect to Mr. J. Hawley Smith.

The COURT: You may proceed.

Mr. KRAMER: If your Honor please, it is our suggestion that Mr. Maletz and I be permitted to divide the argument. Mr. Maletz will sum up the facts for the Government, and I should like to argue the law applicable to the case.

1109

The COURT: You may divide the matter between yourselves in your own discretion. I want to say before you start summarizing the facts that I hope you will bear in mind the statement I made at the opening of this session, namely, that I have read the transcript of the evidence.

1160 *Argument on Behalf of National Association of Real Estate Boards and Herbert U. Nelson*

Mr. WHITEFORD: If your Honor please, I speak for the National Association of Real Estate Boards, which for short I shall call NAREB. It is not my intention to argue the law as to whether real estate brokerage in the District of Columbia is or is not commerce. That question of law will very naturally fall into Mr. Leahy's argument, so there is no use arguing it twice. However, in listening to the question your Honor asked Mr. Kramer, referring to the sentence quoted from the Clayton Act, that human labor is not an article of commerce, Mr. Kramer replied by saying, "Well, that applies only in the employer-employee relationship."

1161 I thought as I sat here, "I wonder what Mr. Kramer would do if Mr. Arthur Rubinstein, the great pianist, Mr. James Melton, the singer, Mr. Albert Spalding, the violinist, Mr. Nelson Eddy, and, we will say, a half dozen other concert artists all sat around a music club some day and said, 'We are not going out and appear in public concerts anywhere except for $3,000 an appearance.' "

There is no employee-employer relationship there. There is personal service. They have a right to agree upon it. I wonder if Mr. Kramer could make Mr. Rubinstein, by injunction, play for less than that amount or perchance play at all.

Take another case: a male quartet. Four men agree to sing together in an organization. They refuse to appear for anything less than the sum of $2,000, for which they hold themselves out to the public. If the public does not want them at that price, it can hire another quartet, just as the public here can hire another broker as against the one who holds himself out to serve at this amount. That strikes me as being more nearly parallel with the service that a broker renders, as against this employer-employee relationship.

But I want to talk for just a moment. Your Honor has such a grasp of the facts of this matter that I hesitate to take your time, hardly, to talk at all. However, the position of Mr. Kramer and his associates in this case has been so changeable and so fleeting that it is with great diffi-

1162 culty that we catch up with them from time to time.

As I listened to their argument this morning, my attention was recalled to page 620 of Mr. Kramer's argument, in a short sentence:

"The Government's position unequivocally is that Article IX of the Code of Ethics of the National Association

coupled with, if the Court please, the pledge of every member of the Washington Board to abide by the Code of Ethics, including Article IX, constitutes a combination in restraint of trade which the National Association was a party to."

Now, of course, they allege there other things about NAREB in the complaint. I am amazed at the shift in position that Mr. Kramer makes this morning as to paragraph 11 of that complaint.

"For many years up to and including the date of filing this complaint, the defendants and others have been and are now engaged in a combination and conspiracy to restrain trade and commerce of the District of Columbia in the sale, exchange, lease, and management of real property and the improvements thereon."

If Mr. Kramer knew when he drew this complaint what he now says he knows and things about the New York Stock Exchange; and if he knew that the fixing of prices for personal services was violative of the law, why did he
1163 not say so in paragraph 11? I do not believe that he believed he could get by with that kind of allegation. So he says in this paragraph that they are engaged in a conspiracy to restrain trade and commerce of the District of Columbia in the sale of real estate. I ask you to search this record, line upon line, and find a word that shows restraint; undue or otherwise, upon real estate.

The COURT: As I said before, the only problem before this Court is whether mere price-fixing constitutes in and of itself unreasonable restraint when applied to personal services.

Mr. WHITEFORD: Yes, sir. But, of course, they were trying to make it apply to real estate there.

The COURT: Yes. I am going to go on the basis of fact rather than on the basis of allegations.

Mr. WHITEFORD: One would assume that they would prove it better than they allege it.

Now, how do they say we do it? By agreeing to observe the constitution, by-laws, and other rules of the Washington Board and of the National Association.

They charge that the defendants and the co-conspirators have planned and acted together to discourage members of the Washington Board from charging rates of commission other than those fixed.

In the next allegation they say that NAREB had a committee on rates, rules, and customs, one of the pur-
1164 poses of the committee being to raise brokerage commission rates, in order to have uniformity for such

rates throughout the United States, and that thereafter it initiated a plan to raise the rates of commission charged, including the District, in accordance with the recommendations of the National Association, and that the Washington Board increased the rates established in its schedule of commissions.

Before they can get an injunction against the National Association, they have to prove those facts. There is not a word of proof in it anywhere. And, remember, they picked the testimony they would offer. The records show they were in the offices of the National Association in March and April, 1946, and they had every piece of paper then that they have offered in evidence now. After that time the matter lay in the Department of Justice for a year and a half before, on the 25th of September, 1947, this indictment and this complaint were filed. I say your Honor's questions and what you have pointed out about the New York Stock Exchange are all the more pertinent when you consider that this matter was allowed to lie in the Department of Justice for one and one-half years when they had every paper they now have, and it was not until that time that they conceived this idea that NAREB was a party to a conspiracy to fix rates in the District of Columbia.

Let me speak about this Code of Ethics. I say that
1165 nobody but a zealot can spin out of this statement of idealism of these real estate brokers, written in 1924, the idea that they intended to fix the rates of the Washington Board in the District of Columbia in 1943 and 1944. This is a statement of idealism. This is a code of ethics.

Mr. Kramer put upon the witness stand Mr. Herbert Nelson, who testified how this was written and what it meant. He testified about it. He testified that this code of ethics was necessary because of the abuses in the real estate fraternity, to which your Honor has partially referred. But there were many of them, and he testified about them—net listings, the right of a broker to buy or the practice of a broker to buy his principal's property and make some profit from it, the fact that brokers were taking commissions from both sides, the fact that they were becoming rich at the expense of their principals by making inordinate profits from property that they took. I say that no person can read this code of ethics without being impressed by the integrity and the sincerity of purpose contained in it. I thought as I read it again yesterday morning, sitting in the office—I have read it many times—it would well do credit had it been a statement of lawyers gathered together in the bar association, where they speak of the

integrity of the relationship between principal and agent and encourage men to adopt these principles.

I say it is straining at a gnat and swallowing a very
1166 large dromedary when they refer to Article XXXV, as Mr. Maletz did this morning, of this code, after you read it, when they say:

"No instructions nor inducements from any client or customer relieve the realtor from his responsibility strictly to observe this code of ethics."

That urges them not to yield to the temptation of double commissions. It urges them to behave decently toward their principals as lawyers should behave toward their clients. It urges them that they should not interfere in the relationship between one realtor and his principal any more than one lawyer may dare go to a client and say, "Don't hire the other lawyer you have."

I say that anybody who reads this code of ethics and tries to spin out of it *per se*, as Mr. Kramer has attempted to do, that this is a scheme or a plan or a conspiracy on the part of NAREB to fix rates of commission in the District of Columbia is not only imaginative but is speaking contrary to the very facts that appear in this record, brought out by Mr. Kramer himself. Why? Well, he says, "You had a committee on rates, rules, and customs." Yes, we did.

They very insistently put into the record this morning—it was not admitted into the other record—a letter that Mr. Nelson wrote to Mr. Joseph Laronge, another member of
the National Association of Real Estate Boards, on
1167 February 28, 1935, before this committee was ever appointed, and he was there telling about the things that ought to be looked into by such a committee. Mr. Nelson said:

"Personally, I have long favored adoption by all of our boards of a uniform statement or basis on commissions, with however provisions for various percentages according to the needs and customs of each community."

He goes on to say that insurance companies and the Government cannot understand why it is they have to pay something for one service in one place and another in another place—which has reason behind it, too.

What happened? The years went on. They put in all these reports that Nelson was making for the Board of Directors, and the roll glibly on the tongue, "Rates have been raised upward." If the contention of these gentlemen is true, it makes absolutely no difference whether they are up or down, if price-fixing, so called, is illegal.

The COURT: I think there is no showing here—in fact, I do not understand that there is any contention—that the rates fixed are unreasonable. There is only a question of law as to whether the mere fixing of prices is a violation of the Sherman Act when applied to personal services.

Mr. WHITEFORD: The question, then, is whether we are co-conspirators. Now, they say we are a co-conspira-
1168 tor—that NAREB is—because this committee on rates, rules, and customs got out a guide that was sent to the Washington Board.

We must remember—I am sure it is only fair to say this—that the Appalachian Coal case decision says—although I hesitate to take a sentence out of an opinion and call it the law—but any language used in this code of ethics must be read in the light of the whole—we must remember that there are 35,000 real estate brokers in the United States who are members of NAREB. There are a thousand real estate boards. When this was written in 1924 to correct abuses, as Mr. Nelson says, we have to read it in the light of what it was intended to do, before we can charge it as being part of the commission of a crime.

Throughout the years they worked out this idea, as Mr. Nelson says in his letter to Joseph Laronge. He says, "We ought to do something like the architects do. We ought to get definitions of the services we participate in and render and then let these people fix the rates for those services."

The COURT: Mr. Whiteford, does not this come down to a question of whether what the Washington Board did was legal or illegal, because whatever the Washington Board did, the National Board encouraged the Washington Board or incited the Washington Board to do? If what the Wash-
ington Board did is legal, then, of course, the activity
1169 of the National Board is praiseworthy. On the other hand, if what the Washington Board did is illegal, then the National Board is in the position of having advocated the doing of an illegal act.

Mr. WHITEFORD: No, sir. I make this distinction: that your Honor could hold that price-fixing for personal services by the local brokers in Washington could be illegal and could be a combination in restraint of trade, to which the NAREB would not be a party.

The COURT: Even though the National Board encouraged the Washington Board to do what the Washington Board did?

Mr. WHITEFORD: No, sir. I say we do not claim to have encouraged it at all. I want to say what did happen. The thing that I must urge always in our thinking is that every

one of these exhibits that they have offered talks about definitions and standards of service—pages after pages of them—so that people will know what it is that a real estate broker does when he enters into a management contract.

Some of these pieces of evidence you may remember—and I am amazed that you remember so much from your reading of the record. But, as Mr. Nelson points out, when you say "I want you to manage my property," what does that mean? It means, for one thing, furnishing a night watchman. For something else, newspaper advertising. So the effort was to fix standards that they should render.

These gentlemen introduced this document themselves, and they say that that guide that was sent out means that NAREB helped connive with the Washington Board to fix those rates.

1170

Here is a letter sent by Mr. Barnard, Chairman of the Committee on Rates, Rules, and Customs, to Mr. Charles J. Rush, Executive Secretary of the Washington Real Estate Board:

"We enclose two copies of the guide on commission rates, rules, and customs, prepared by the National Committee on this subject. We would appreciate your Board referring this schedule to some committee or officer interested in the matter of commissions who could compare it with your schedule, definitions, and customs and give us the benefit of your comments and advice. If this guide is out of line in any important point with your own practice, will you please advise us? If you think the guide would be an improvement on your present practice, will you also let us know this fact?

"It is the purpose of our committee this year to try to perfect our guide and to bring the matter of improvement of local board schedules before the delegates at the Detroit Convention in November. Recent experiences with Government agencies and with important fiduciary institutions lead your committee to feel that this subject is exceedingly timely and that much good could be accomplished if our member boards could agree on certain basic definitions and procedures such as suggested in the guide.

1171

"In order to make reference to any particular section easier, we have arranged the guide on an alphabetical basis. In commenting on any particular item, it would save time if references were made to the point in question by number and letter.

"Your National Committee would also appreciate knowing whether your Board has recently revised its schedule and whether the guide has been helpful in this process.

"It would be appreciated if you would respond to this letter within the next two or three weeks. Please send your replies care of headquarters office, 22 West Monroe Street, Chicago."

Mr. Rush, Executive Secretary of the Washington Board, on the stand said, "I got that, threw it in the drawer, and never looked at it again. I haven't any idea how it compares with it."

The COURT: Mr. Whiteford, here is what is passing through my mind. The first question for me to decide is whether what the Washington Board did is illegal. If I hold that what it did is legal, then the entire case falls. If I hold that what it did is illegal, then I have an additional question, namely, whether the injunction should extend to the National Board.

1172 Mr. WHITEFORD: Yes, sir.

The COURT: I do not wish to interfere with counsel's presentation, but this is my inquiry: whether it would not be helpful if you made just a short presentation, and if I should decide that the activity is an illegal one, I will hear you again at length on the question whether an injunction should extend to your clients.

Mr. WHITEFORD: That suits me perfectly. I was going to add one more sentence and be finished. If they got an injunction—if they won—assuming they were right—what would happen? Article IX would read this way:

"The schedules of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every realtor except in the District of Columbia."

Truly would not the mountain have brought forth a mouse with any such result as that?

Thank you, sir.

Mr. LEAHY: If your Honor please, I am going to be very brief.

The COURT: I will be very glad to hear you at length, because you have the principal point in the case.

Mr. LEAHY: That is true, if your Honor please.

1173 *Argument on Behalf of Washington Real Estate Board and Individual Defendants Other Than Herbert V. Nelson*

Mr. LEAHY: If your Honor please, the question arises as to whether the shift of position at this point, now made by the Government, from that which it alleged in its complaint

and upon which the criminal case was tried is going to govern on this record. Mr. Whiteford has already indicated what the conspiracy charged in the complaint is. There is no such conspiracy charged as that to which Mr. Kramer has directed his argument, that the Washington Board alone is charged with conspiring. The conspiracy charged is an integrated one, initiated by the National in the way of recommending that the Washington Board shall take certain steps, consummated by the allegation that in accordance with said recommendations the Washington Board did raise rates. They are to be found in paragraph 11 and in paragraph 15.

Paragraph 11 lays down a conspiracy in such broad language as to restrain all trade and commerce in the sale of real estate—not trade—among brokers themselves. That is an entirely different conspiracy there. He has ridden off on his horse now.

The COURT: Is not the crux of the conspiracy set forth in paragraph 12?

Mr. LEAHY: "Paragraph 12. By agreeing to observe and by observing the constitution, by-laws, code of
1174 ethics, and other rules of the Washington Board and of the National Associations"

They are tied together, just as the two arms are tied to our body. It is an integrated conspiracy, in which the National is associated with the Washington in such a way that if you strike out the National, you have not a conspiracy.

Going down to paragraph 14, they again allege:

"*Said committee* made studies of brokerage commission rates prevailing in various States of the United States and the District of Columbia."—

referring to the National—

"and thereafter initiated a plan to raise rates of commission charged by the various members of the National throughout the United States, including the District of Columbia."

Then, paragraph 15 says:

"In accordance with the recommendations of the National Association, the Washington Board increased its rates."

Furthermore, to emphasize the integration of the conspiracy, they now advise your Honor that all the individual defendants are sued as representatives of a class. So it is between two boards, the National Board and the Washington Board.

Now, to shift the position from that which is al-
1175 leged, upon which we felt to be the record upon which we tried the case, is to depart entirely from the issue raised in this case, of one of conspiracy between the members of the Washington Board and itself, to-wit, the Washington Board. So I say there is a clear departure from the pleadings. Therefore, I say conspiracy in this case cannot stand, because conspiracy is not proved in point of fact.

All of the evidence which was brought in against the National in this case led up to one act. That act was the Guide sent by the National in 1941 and deposited by Mr. Rush in a drawer. It was never brought to the attention of the Board, and the membership of the Board gave no consideration to it whatsoever, and that ends the National's connection. That is the act upon which the Government sought to prove that there was hatched out of this a conspiracy of the National with the Washington.

The COURT: Mr. Leahy, may I interrupt you with a question? This being a civil case, the complaint may be amended to conform with the proof, and under the rules may be deemed to be amended to conform with the proof. Now, unlike the criminal indictment, where there were only two defendants—in the criminal case there were only two defendants—and, of course, a person cannot conspire with himself—here you have numerous defendants, and if a conspiracy between any two of them is shown, that is
1176 sufficient to make out a case. So it makes no difference from the standpoint of the Washington Board, it seems to me, whether the National Board is held or not.

Mr. LEAHY: That is true, if your Honor please, with reference to the right of the Court to permit amendments to conform with the proof. But the proof in this case shows only the attempt upon the part of the Government to establish the conspiracy as alleged and the effects of the conspiracy charged.

The COURT: I should say the crux of the charge is that in 1943 the Real Estate Board changed the rates and established a different, uniform rate. Is not the question I have to decide whether that was an illegal act in and of itself, irrespective of the allegations of the complaint?

Mr. LEAHY: All right, your Honor. We will just advert to that for a moment.

The COURT: Suppose we recess now until 2 o'clock. Before recessing, however, I want to suggest this question to the two of you, because you may want to give it some thought during the luncheon recess: that, after all, is not

the only question for me to decide, so far as the Washington Board is concerned, whether the price-fixing policy, with no proof of unreasonableness, as applied to personal services is illegal? I am wondering whether this case does not come down to that.

(At 12:30 p. m. a recess was taken until 2 p. m. of the same day.)

* * *

1193 *Closing Argument on Behalf of Plaintiff*

* * *

1196 The COURT: You are not drawing a distinction between wages, salaries, and commissions on a percentage basis?

Mr. KRAMER: There is a difference between working by the hour, day, or week and working on the sale of a particular house.

The COURT: How about an airplane pilot, whose earnings may amount to $10,000 a year? He is not a workman in the ordinary sense of the word, yet he has a union which fixes the wages that he shall receive, or I should say the salaries. That is really what troubles me, so far as the Government's case is concerned.

Mr. KRAMER: Since that is what is bothering you, let me call attention to something your Honor stated at the beginning, which troubled me. The minute I opened my mouth about the Norris-LaGuardia Act, you said you did not see how that had anything to do with it. In that Hutchinson case, it was not Section 6 of the Clayton Act that caused the Supreme Court to rule against the Department, but it was the Norris-LaGuardia Act. Section 6 of the Clayton Act is purely predicatory.

The COURT: I confess that the reasoning in the Hutchinson case is indirect, but I am not basing the question
1197 that I asked you on the Hutchinson case. I am basing it on the wording of the Clayton Act.

The Chief Justice of the United States in a very recent opinion—within the last few weeks—said that when the language of a statute is clear, there is nothing to construe.

Mr. KRAMER: You are referring to the National City Lines case, in which the Department was proved, rather comprehensively, I thought, wrong.

The Clayton Act says that the labor of a human being is not a commodity.

Mr. LEAHY: Don't you think the Sherman Act deals with commodities?

Mr. KRAMER: I do not think it deals with commodities alone. These railroad rate cases, if the Court please, not personal services—

The COURT: It is not a commodity or an article of commerce. It goes further than that.

Mr. KRAMER: I do not say it is not an article of commerce. I say, along with the Court of Appeals in the Medical Association case, where they held trade or commerce subsumed in the phrase, "restraint of trade or commerce," applied to every undertaking in which human beings engaged for a livelihood. I thought your Honor's point was—

The COURT: I made no point. Courts make on points, they only ask questions.

* * *

1211 United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

Washington, D. C.,
Thursday, July 28, 1949.

The above-entitled matter came on for hearing at 10:00 o'clock a. m., Thursday, July 28, 1949, in the United States District Court for the District of Columbia, in the Court House, in the City of Washington, District of Columbia.

Before: HONORABLE ALEXANDER HOLTZOFF, Judge, United States District Court for the District of Columbia.

APPEARANCES:

Victor H. Kramer, Esquire, Special Assistant to the Attorney General, and C. Heyward Belser, Esquire, Special Assistant to the Attorney General, on behalf of the Plaintiff;

1212 APPEARANCES (Continued):

Messrs. Whiteford, Hart, Carmody & Wilson, by Roger J. Whiteford, Esquire, and Jo V. Morgan, Jr., Esquire, on behalf of National Association of Real Estate Boards and Herbert U. Nelson;

William E. Leahy, Esquire, on behalf of Washington Real Estate Board and individual defendants other than Herbert U. Nelson and J. Hawley Smith.

PROCEEDINGS

The DEPUTY CLERK OF COURT: Any further preliminary matters?

Colloquy

Mr. KRAMER: In the Real Estate case does your Honor wish to hear comment from the Government on the proposed findings?

The COURT: Very well.

Mr. LEAHY: If the Court please, we have proposed findings of fact on the part of the defendant. I would like to pass them to the clerk. There is a carbon copy also.

The COURT: Are there any objections?

Mr. KRAMER: There are, your Honor.

The COURT: Take them one by one.

Mr. KRAMER: There is no objection to number 1, and no objection to number 2 except the figure should be
1213 1774, as in Government's Exhibit 53.

The COURT: What about that, gentlemen?

Mr. LEAHY: Well, as I recall it, the 1774 were practically brokers, but there were salesmen licensed about 2,000.

The COURT: In either case I don't think it makes any difference.

Mr. KRAMER: As to number 3 no objection. Number 4 no objection.

Number 5, my only objection is to the second sentence in that there is no evidence to support it, and the evidence is to the contrary.

Mr. LEAHY: I beg pardon?

Mr. KRAMER: No such commission is payable unless a sale is consummated.

The COURT: I do not understand that to be the fact. My understanding of the law is that the commission is payable if the broker produces a purchaser who is willing to purchase on the seller's terms, even though the sale is not consummated. What about that second sentence?

Mr. WHITEFORD: Your Honor, that statement is partially true in real estate transactions, but in the particular transaction when the broker succeeds in getting a contract in which I agree to buy your house, if I do not go through with that transaction the broker gets no commission.

The COURT: That is not my understanding. I have
1214 had brokers before me where the purchaser does not go through.

Mr. WHITFORD: If the broker finds a purchaser ready and willing to buy on the terms suggested by the owner of the property, then he would be entitled to his commission.

The COURT: That is why I think that sentence isn't an accurate statement of the law.

Mr. WHITEFORD: Well, it doesn't stop either side, it is kind of in the middle.

The COURT: I am inclined to think it ought to go out.

Mr. WHITEFORD: It might be elaborated on.

The COURT: I think the statement of law as to when the broker's commission is earned is relevant, but I do not think this is a correct statement of law.

Mr. WHITEFORD: Of course, under any agreement by statute this would not be true, and under the Code it would not be true.

The COURT: In the District of Columbia doesn't a broker earn his commission if he produces a purchaser ready, able and willing to buy on the seller's terms?

Mr. WHITEFORD: That is only partially true. If the purchaser does not go through with his contract he does not get his commission.

The COURT: But suppose the seller does not go through?

Mr. WHITEFORD: He gets it.

The COURT: I see no reason for it.

1215 Mr. LEAHY: Let's drop it out.

Mr. KRAMER: In number 6 it quotes a clause from your Honor's opinion. The rest of it is not a verbatim statement.

The COURT: What is the objection?

Mr. KRAMER: This number 6 is taken from your Honor's opinion and it omits part of the sentence.

The COURT: What do you want to insert?

Mr. KRAMER: Insert the words "fixed rates of commission." That conforms with your Honor's opinion.

The COURT: I think I will leave it as it appears.

What is next?

Mr. KRAMER: If the Court please, I am compelled to raise this question with you because we think it is vital to have it in because otherwise we can't tell the basis on which it was arrived at.

Mr. LEAHY: What you want to make it is that they had fixed rates?

Mr. KRAMER: We only want what his Honor stated.

Mr. LEAHY: This is what his Honor stated.

The COURT: I am going to leave it as it is.

Mr. KRAMER: No objection to 7, 8, 9. No objection to 10. Our objection to 11 and 12 is that it is not an exact quotation from the Court's opinion, and varies the opinion a little bit.

1216 The COURT: I do not think findings of fact are intended to be quotations.

Mr. KRAMER: I agree with you.

The COURT: What is your objection to 11? I think it is a correct summarization of the evidence.

Mr. KRAMER: Your Honor said in an exceptional situation a lower charge is made than that prescribed by the Board.

The COURT: No, I think I will leave it in.

Mr. KRAMER: Of course, we object to finding number 13. It goes to the heart of our position. We understand your Honor's idea is to the contrary.

The COURT: It does not go to the heart of the situation at all. You conceded you had no proof that the rate was unreasonable. You took the position it was illegal *per se*, and that is what I ruled on, that it was not illegal *per se*.

Mr. KRAMER: I think that last clause did that.

The COURT: This is a quotation from my opinion?

Mr. KRAMER: That is correct.

The COURT: I will leave it.

Mr. KRAMER: As to finding 14, our objection is to the second sentence in that we maintain that there was no evidence.

The COURT: I am going to strike out the second
1217 sentence in 14 because that is a matter of opinion, or comment, rather than a finding of fact, and I am making a slight change in the first—I am going to strike out the first four words, and start the sentence with the word "Before" so that finding 14 will read, "Before the Board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive charges, and one of the purposes of the Board was to eliminate this undesirable condition."

Mr. KRAMER: No objection to finding 15.

Finding 16 the Government strongly objects to. Your Honor did not decide the case on the theory that the Board did not fix rates, and this is an attempt, as we see it to modify the theory on which it was decided.

The COURT: That is not the question before me. The question before me is how that—

Mr. KRAMER (interposing): Your Honor did not indicate anything in his opinion that the evidence showed that.

The COURT: I think the evidence shows that. I shall leave that.

Mr. KRAMER: If the Court please, if the words "non-mandatory in character" were changed to read "the rates should be adhered to," I would follow the finding, but this can be construed in almost any direction counsel wishes to construe it.

The Court: There is nothing ambiguous about the
1218 words "non-mandatory."

Mr. Kramer: Of course, if you come to an interpretation—

The Court (interposing): Not at all, because there are some associations of brokers which would penalize a broker for not—I am going to leave it the way it is. I think it is just a choice of words.

What is the next?

Mr. Kramer: Findings 18 to 24 we object to because they consist merely of a digest of the supplemental answer of the defendants, and we understand it is not good form to digest non-contested pleadings.

Mr. Leahy: That is the conspiracy.

The Court: I will hear you on that.

Mr. Leahy: What about 17?

Mr. Whiteford: He didn't object.

The Court: No objection to 17?

Mr. Kramer: I didn't say I had no objection. I would much prefer to have the finding reflect what it does, but they put in finding 16, and I am in poor position as to 17.

The Court: I will read it. I see your point as to 18, and I am wondering, Mr. Leahy, why there should be a finding in a criminal case.

Mr. Leahy: We discussed that quite a bit, and hoped in some way we could get the law fixed as *res judicata*,
1219 which was not done in the Plasterboard case that went to the Supreme Court.

The Court: It seems to me that a judgment in a criminal case would be a little different, because it would have to be proved beyond a reasonable doubt.

Mr. Leahy: If your Honor doesn't think it ought to be in there let's strike it out.

Mr. Whiteford: I certainly would like to have it in and, after reading many times Judge Stephens dissent in the Gypsum case, I think it is something we should urge, and I do not want to waive the right to urge it in the Supreme Court.

The Court: You don't waive it, but I was wondering if I should make findings.

Mr. Whiteford: Except I did state at the close of the case we were not arguing *res judicata*, but I did not want to abandon it.

The Court: While I doubt the relevancy of these findings, there is no harm in having them in, and if counsel has no real objection, I will leave them in.

Mr. KRAMER: If the Court please, I have some doubt as to the accuracy of 24.

Mr. LEAHY: You want 24 in, is that right, Mr. Whiteford?

Mr. KRAMER: I have some doubt as to the accuracy
1220 of 24. Other than that I think they state what happened all right.

Mr. WHITEFORD: I did not, in one sense, continue to assert the defense of *res judicata*, but I just wanted it understood I was not waiving it, that is all.

Mr. KRAMER: Your Honor, the Government submits that the evidence—

The COURT: Have you a copy?

Mr. KRAMER: Yes, I apologize for having to show you a carbon. Starting at 17, if your Honor please, of the Government's proposed findings against the National Association, as to which the defendants have proposed nothing, I presume on the ground—

The COURT (interposing): The mechanics of this are unfortunate. I have no way of taking your findings and writing them into the document. You should have submitted a complete counter set.

Mr. KRAMER: We did, your Honor, but those are all the findings the Government wants.

Mr. WHITEFORD: May we, before we discuss that, state to your Honor that so far as the National Association is concerned, we were in a quandry as to what to do with the findings of fact. Your Honor will recall in the course of the argument you intimated in case injunction should be granted, if you came to that conclusion, you would then hear the National Association on whether they had
1221 engaged in a conspiracy at all, but your Honor's findings make no mention as to the National Association but decided it on the District Board, and I am perfectly willing to let it stand as we offered it, but if there are to be findings of fact so far as the National is concerned, then we have certain suggestions to offer in lieu of the ones we have.

The COURT: I think it would be helpful to you if we make findings.

Mr. WHITEFORD: So far as the National is concerned, then in connection with that we have three findings that we would add, and which I now hand to your Honor, that we would offer as part of the findings that you have already considered.

Mr. KRAMER: If the Court please, their number 1 is the same as our number 17.

Mr. WHITEFORD: That is right.

The COURT: Number 1 and 17 are the same. I will make that finding and the next one, I think I will make you finding, Mr. Whiteford—no, I will modify that. I don't like to say that, but I will make a finding that they did not conspire with the Washington Real Estate Board to fix, and so on.

Now, how about the remaining findings proposed by the Government?

Mr. KRAMER: If the Court please, we have our number 19.

The COURT: Do you have anything to say about the defendant's three findings?

1222 Mr. KRAMER: We object to the findings your Honor just made.

The COURT: Then you have 19, 20 and 21 and following. I think, Mr. Kramer, some of those are evidentiary.

Mr. WHITEFORD: Exactly what would be my objection.

The COURT: Yes, I think they are evidentiary. I like to make ultimate findings.

Mr. KRAMER: Could I make a suggestion in view of what your Honor has done in connection with the defendant's proposed number 3? Would you also find that they encouraged the Washington Board but did not conspire with them to fix and prescribe?

The COURT: No, I won't do that. I think it is evidentiary. I will make the general finding that there was no conspiracy, and the rest is argument.

Mr. WHITEFORD: I think following that every one is—

The COURT (interposing): I think I won't make any further findings than these three.

Mr. KRAMER: The only finding your Honor made that I did not follow, that is probably my fault, is the finding about non-mandatory.

The COURT: If you don't know, I suggest recourse to the dictionary because that is an obvious word.

Mr. KRAMER: Why should it—could I ask your Honor a question? Your Honor found and decided as to the

1223 fixed rates of commissions paid to brokers on sales of real property, and our argument is that that is not what the Court concluded and found, and if that was in the findings it would be possible to tell, but without that it is impossible to tell on what theory the case was disposed of.

The COURT: I think I will leave it as it is.

Mr. LEAHY: Does your Honor care to glance at the conclusions of law?

Mr. KRAMER: There is no objection as to the form of the conclusions of law.

The COURT: I won't sign them at this time because it will be necessary to incorporate these of the National Association. I think they should do that.

Mr. WHITEFORD: We shall do that.

Mr. KRAMER: I understand your Honor is going to another District at the end of this week.

The COURT: No, I won't leave town until the next week, but I do not see any reason why you should not have them submitted this afternoon or tomorrow, and I think there should be a form of judgment. I think that is all that is necessary. I think I would rather not sign the judgment until I sign findings. I will be very glad to have the findings submitted in final form as agreed upon tomorrow morning.

(Thereupon the instant hearing was concluded.)

1224 Reporter's Certificate to foregoing transcript omitted in printing.

1226 United States District Court
For the District of Columbia

Civil Action No. 3472–47

(Title Omitted)

Washington, D. C.,
Friday, October 14, 1949.

A hearing in this matter was held before District Judge T. Alan Goldsborough in Civil Division No. 1 at 10:00 a. m.

APPEARANCES:

On behalf of the plaintiff:
Mr. Victor H. Kramer,
Mr. Herbert N. Maletz, and
Mr. C. Heyward Belser.

On behalf of the defendants:
Mr. Jo V. Morgan, Jr.

1227 The DEPUTY CLERK: The case of United States of America v. National Association of Real Estate Boards, *et al.*

Colloquy

The COURT: All right, gentlemen, proceed when you are ready.

Mr. MORGAN: May it please the Court, I am Mr. Morgan.

I am appearing here today to argue this motion for all the defendants.

The COURT: Whom do you represent?

Mr. MORGAN: I actually represent the National Association of Real Estate Boards, but the defendants have agreed that I should argue the motion as far as all the defendants are concerned.

The COURT: Who are the rest of them? I do not know.

Mr. MORGAN: The National Association of Real Estate Boards, Herbert U. Nelson, Executive Director of the National Association of Real Estate Boards; the Washington Real Estate Board, and their Board of Directors were made defendants in an antitrust action in this court which was determined by Judge Holtzoff during the summer.

Some weeks ago an order was presented to your Honor by the Government concerning designation of the record on appeal. It was presented to you, your Honor, because you were sitting in Motions Division at that time, and it was a formal matter concerning procedure, and this
1228 matter concerns procedure. Otherwise I am sure it would have been referred back to Judge Holtzoff, who heard the case and entered the judgment.

The order which has brought about this motion is an order required under the rules of the Supreme Court, to which a direct appeal is available to the Government in this case, which requires, among other things, after the record had been designated, or permitted the Government to obtain an order allowing the original records to go up on appeal, rather than copies of the record.

Without any notice to the defendants, and entirely *ex parte*, an order was presented to your Honor for signature on the 23rd or the 26th day of September, which was entitled, "Order to Certify and Transmit Original Documents," to the Supreme Court on this appeal.

We would take absolutely no issue with the desirability of transmitting original documents on this appeal. We believe the original documents should be transmitted. But what we do take issue with is not the title of the order but some textual material which appears in the order. For instance, the order provides only for the transmittal of the record as designated by the Government, and Rule 10 of the Supreme Court gives us ten days in which to designate other portions of the record. The Government did not wait until the end of the ten-day period to see whether we would designate other portions of the record. They
1229 filed their designation, and the same day

The COURT: What is the fuss about?

Mr. MORGAN: The fuss is about this. Technically the order does not allow us to designate any more portions of the record, as the Supreme Court rule requires. We have filed within the ten-day period a counter praecipe for the transmittal of such other parts of the record as we desire. Technically, your Honor's order, although it is not entitled that, would only permit the Clerk to send up the part of the record which the Government—

The COURT: Does the Government object to your suggestion?

Mr. MORGAN: Not to that part of my suggestion, I understand; just informally. What I understand they object to is the rest of our objection, which is that another praecipe, which is incorporated into the terms of your Honor's order—they have designated certain parts of the record which are not properly in the record in this case. They fall into two classes. The first is they have designated their memorandum of points and authorities. We do not believe that the memorandum of points and authorities is a part of the record. We have always understood it is not part of the record. We do not feel the record should be cluttered up with argumentative material which will only have to be repeated in the briefs. Since we have designated the
1230 entire record on appeal, we want it to be clear in the record that we do not want a memorandum of points and authorities to go up. We do not feel, even in designating the entire record, that the Government can designate a memorandum of points and authorities.

More serious, however, is the fact that after judgment and at the time of filing the appeal, the Government had filed with the Clerk an affidavit containing material which was not in the record in the case when the judgment was entered. In other words, they have put something in the record of the case which was not before the Judge who decided the case and is not in the record. I would like to dwell on that at some length, because that is the main—

The COURT: You do not need to dwell on it. If that is what they did, it was wrong. I do not know what it was.

Mr. MORGAN: I have conferred with the Clerk of this Honorable Court to determine under what authority that was accepted. It was accepted by one of the Deputy Clerks and, of course, it was not referred to him. He was unable to apprise me of any authority by which an affidavit containing material which was not in the record could be filed in the case and then transmitted to the Supreme Court.

The material which was attempted to be put in the record, and which we think, along with the points and authorities, should not be designated to the Supreme Court, were an affidavit in the case and what had been our draft
1231 of some findings of fact, which, as your Honor may see from the record—this was a civil action—an equitable type action—under the antitrust laws, and Judge Holtzoff entered findings of fact and made conclusions of law in July. He did not adopt entirely the suggestions we made. We had a draft of findings of fact which we handed up to him. The Judge was not entirely satisfied, especially since we had not done it in the right form. He gave it to us, together with some additional points, to redraft and present again.

It has always been my understanding that in drafting an order for conclusions or findings, which are handed to a Judge and rejected as being not in the proper form for signature, such documents are not considered to be filed.

The Court: That is correct.

Mr. Morgan: It is that which the Government has put into the case.

The Court: What for?

Mr. Morgan: That is what I cannot understand. I do not see how they can urge on appeal that failure to adopt our original proposal could be an error of the Judge; also that it is not alleged in their assignment of error that refusal to adopt this rough draft we presented the Judge, which has never been filed.

I might remark, your Honor, that the thing that caused our filing the motion was a telephone call from one
1232 of the attorneys from the Government, saying he had called Judge Holtzoff, and that Judge Holtzoff had directed him to tell me to file this in the case. Before doing that, I called Judge Holtzoff, and he said no, he would not have taken that manner of instructing the attorney, and he would not pass on the question without a motion. No motion was made. Yet this method of getting it into the record by them was made just as they filed the appeal, without any notice to us. In other words, they got an order from your Honor, which was the only way of actually certifying to the Supreme Court by reading into it something which was not in the case at all, without any notice to us, and we thought that order should be modified.

The Court: Was I told by the Government, Mr. Weis, that this order had been submitted to counsel for the other side?

Mr. WEIS: I do not remember that, sir.

Mr. MORGAN: I can say from the record that it had not been, your Honor, because the certificate which is in the record, which was mailed to us, is a copy of the signed order, your Honor, along with the praecipe. In other words, the order we received already had your signature and date on it, so it must have been mailed to us after you signed it.

The COURT: Proceed, sir.

Mr. BELSER: Your Honor, there is really but one thing at issue between the parties, and that is the question
1233 of inclusion in the record of the affidavit with respect to the defendants' findings of fact.

As regards the fact that the order submitted, as Mr. Morgan describes it, *ex parte* by the Government, requesting that the Clerk transmit the original documents which we had designated, we are perfectly willing, and we offered counsel, to modify the order and put language in there so that other portions of the record which they designated will also be transmitted. We, of course, did not know whether they would designate additional portions of the record. It is perfectly within their power to submit another order to you, directing that the portions of the transcript which they desire should be transmitted.

The COURT: What is your idea in sending points and authorities to the Supreme Court with the record?

Mr. BELSER: We admit that the inclusion of memoranda of points and authorities is not commonly done, although there are one or two cases where it has been done before. But we are not going to press that matter. The memorandum can be duplicated later in briefs, if it is so desired. We are advised by our people in the department that the Supreme Court on occasion desires briefs and memoranda submitted, and we wanted to have them available if they were desired. It was a harmless matter. If this is an excessive designation, the Supreme Court has the
1234 power to penalize the parties by withholding or imposing costs for—

The COURT: It is perfectly obvious that points and authorities used in the court below are not a part of the record to go to the Supreme Court. That ought to be obvious to anybody.

Mr. BELSER: The matter really at issue between the parties is the affidavit with respect to these proposed findings of fact.

The COURT: What does the proposed findings of fact have to do with the Court's order? The only thing which

should go to the Supreme Court is what the lower court signs.

Mr. BELSER: It is the Government's position, and we think the law is clear, that the parties are the best judges of what they wish to have go to the appellate court. Under the present Federal Rules of Civil Procedure, it is up to the parties to designate what they want transmitted, and the district court is not to be bothered with determining, or have the duty imposed upon it to determine, what should go forward. I have collected some authorities here on that point, which I shall now hand to the Court and to opposing counsel. I think the law is very clear. That is one purpose of the provisions of the Federal Rules.

The COURT: What possible purpose is there? It is simply a matter of practice for counsel who is successful in the court below to make up what he thinks are the proper
1235 findings of fact and conclusions of law and submit them to the court. That is just a matter of practice. As far as the law is concerned, it is the court's duty to do the whole business from start to finish. By what possible manipulation of your mind can you reach the conclusion that the suggested findings of fact and conclusions of law, instead of the findings of fact and conclusions of law designated by the court, should go to the Supreme Court?

Mr. BELSER: May it please your Honor, the Court of Appeals for the District of Columbia has in its decision in the Switzer case, 142 Federal (2d) 84, approved the practice of prevailing counsel submitting findings of fact. The court there said that it felt the appellate court should have the benefit of comparison of the proposed findings with the findings found, so that —

The COURT: This Court does not think so, sir.

Mr. BELSER: The Government's primary point is that it is up to the appellate court to determine and settle the issue.

The COURT: The appellate court can correct me, if it sees fit. If I had known that that was in there, I would never have signed the order in the first place.

Mr. BELSER: May I call your Honor's attention to an appellate opinion and read some language which I think is exactly on the point? In the case of Treasure Im-
1236 ports v. Henry Amdur and Sons, the record came to the appellate court —

The COURT: What appellate court?

Mr. BELSER: The Second Circuit.

The COURT: I am not interested in that.

Mr. Belser: It may not be in point, sir, but the reasoning is very appealing, sir, and I should like to have the opportunity to present it to you.

The Court: I am not going to cut you off.

Mr. Belser: The citation is 127 Federal (2) 3 (CCA 2, 1942). The Court said:

"* * * We have had occasion recently to point out that the Federal Rules do not permit the district court to prevent parties from including in the record any part of the occurrences below which they wish thus included. * * * That this power is thus restricted was demonstrated by the Chairman of the Advisory Committee at the New York Symposium on the Federal Rules, 1938, when he observed: 'You will note that * * * where one party designates a part of what appears in the record, a part of the transcript, and the other party does the same thing'."

The Court: But the point is that the suggested findings of fact and conclusions of law are no part of the record.

Mr. Belser: The proposed findings of fact were submitted to counsel, and they were submitted to the court.

1227 The Court: That is not part of the record.

Mr. Belser: We have cases, your Honor, which say that it is not within the power of the district court to keep anything from the examination of the appellate court that represents occurrences which actually took place in the district court.

The Court: Why was this order submitted to the district court, if the district court had no jurisdiction?

Mr. Belser: The district court had jurisdiction, your Honor. There are cases, Prichard v. Nelson, 55 Federal Supplement 506, which say that the fact that they were submitted after judgment is of no consequence; the parties have a right to call them to the attention of the appellate court. We have records here, Supreme Court records, which have proposed findings of fact in them. We have them here for your examination.

The Court: The Court rules right now specifically, first, that the findings of fact and conclusions of law submitted by counsel to the district court are not part of the record to go to the Supreme Court. If they are in this designation, they will be stricken out. The Court specifically rules that the points and authorities submitted in the lower court are no part of the record to go to the Supreme Court, and will strike them out if they are in the designation. If the

Supreme Court wants to say that the District Court 1228 is wrong, it is within their power to do so.

Mr. Belser: Does your Honor have any suggestions as to how this ruling may be reviewed, sir?

The Court: Sir?

Mr. Belser: It is almost impossible for us to secure a review of this. We feel that our interests are being damaged. We have a very good reason for requesting these proposed findings of fact to be included in the record. With this state of affairs, it is almost impossible for us to secure a review of this ruling.

The Court: I thought you said the Supreme Court had authority to do it?

Mr. Belser: The Supreme Court has authority, certainly, to strike from the record or to penalize us for including anything which is not properly in there, but if it does not have it before it, and this Court is without authority to transmit it from here up there, how can the Supreme Court review the matter? It cannot. It can strike things or penalize us for including things that have been improperly included, but it cannot review things of which the res is not before them.

The Court: Of course, you have a perfect right before any appellate court to suggest that the district court did not include matter which you requested to be included and which you think should be included.

1239 Mr. Belser: That is just the point that the Court of Appeals made before. It said that when a Federal Judge refuses to order up things that it is necessary to review, there is no review possible. There have been cases—they are very rare—but there have been cases where Federal Judges have refused under their power to settle bills of exceptions to allow things to go into the record, things which actually happened, much to the prejudice of the parties. I think the only fair and equitable thing to do is to allow them to go up, and if they are improper they can be stricken there or we can be penalized there and no harm can come to anybody by including matters which actually happened in court.

The Court: Gentlemen, do you understand what the Court's ruling is?

Mr. Belser: Yes, your Honor.

The Court: All right.

Mr. Morgan: May I submit an order?

The Court: Submit it to counsel for the other side before you hand it to the Court.

Mr. Morgan: Yes, sir.

The Court: The Court wants to say to Government counsel and to other counsel, and have it understood, that whenever you come before the Court to submit an order for the Court to sign, before signing that order the
1240 Court wants to be assured that counsel on the other side have had an opportunity to see what has been suggested to be placed in the order as to what shall go up.

Mr. Morgan: Mr. Maletz, at the table, has informed me that he believes I have misquoted him with respect to the telephone conversations I had with him and with Judge Holtzoff, in my statement to your Honor. I have quoted them according to my recollection, and I should like to ask the Court to give Mr. Maletz an opportunity to state his version of these conversations, if he wishes to do so. I have told your Honor exactly what I remember of the conversations with Mr. Maletz and with Judge Holtzoff.

The Court: I want to say this to Government counsel. If Government counsel wish to make a designation of what they asked to be included in the record, and what the District Court declined to include in the record, and it is a correct designation, as I am certain it will be, this Court will sign it, stating that the District Court has refused it. You may then present it to the Supreme Court. If the Supreme Court says I am wrong, I can be corrected.

Mr. Belser: I understand the Court will sign an order stating that he refused to designate this as a part of the record?

The Court: Not an order. I will sign a statement to the effect that I have refused to designate the mat-
1241 ters which I have excluded today as part of the record.

Mr. Belser: We will have the power to transmit the excluded portions to the Supreme Court? They will be in the statement, of course?

Mr. Morgan: If your Honor please, I do not believe that is what your Honor had in mind.

The Court: That is not what I said. To say that the Supreme Court has not a right to correct the District Court is just simply so ridiculous that it is not worth talking about. If the District Court has done something wrong, the Supreme Court has a right to correct it. There isn't any question about it. Any appellate court has that right, to correct the record.

In the Court of Appeals of Maryland, counsel often asks for a writ of diminution, and the Court of Appeals corrects the record if it is not full enough.

Mr. BELSER: Would not a writ of diminution reduce the record?

The COURT: No; a writ of diminution says the record is not a full record; there should be something added.

Mr. BELSER: We will prepare such a statement.

The COURT: All right. I will gladly sign it, of course.

Gentlemen, the Court would like to have no further misunderstanding in the case. Before either party submits anything to the Court, kindly submit it to the other
1242 side; and if you cannot agree, you may both come before the Court.

Mr. MALETZ: I should like to say this while Mr. Kramer is here. Mr. Morgan has indicated that his recollection of the conversation with Judge Holtzoff differs from my recollection of the conversation with Judge Holtzoff. I should like the record to show that I communicated with Judge Holtzoff over the telephone. Mr. Kramer was in my office at the time and is familiar with it, having listened in to the conversation.

We had quite a discussion over the telephone with Judge Holtzoff with respect to the inclusion of the proposed findings of fact in the record. It was his position that they were not properly part of the record. We disagreed with Judge Holtzoff at the time over the telephone. We think that the transcript of the hearing before Judge Holtzoff with respect to findings of fact is completely unintelligible to the Supreme Court unless the defendant's proposed findings of fact are included in the record. But no matter.

At the conclusion of my telephone conversation with Judge Holtzoff, Judge Holtzoff said or suggested that I call counsel for the opposing parties, which I did. I indicated that I had spoken to Judge Holtzoff and that Judge Holtzoff had suggested to me that I call them with respect to filing those proposed findings of fact.

I think that Mr. Kramer, and this is entirely for
1243 the purpose of the record, your Honor—is completely familiar with that conversation.

Is what I have said correct?

Mr. KRAMER: I think, if the Court please, that what Mr. Maletz said comports with my recollection of it; but your Honor has ruled, and I think we ought to stop.

The COURT: Gentlemen, there is another phase of this situation that is not clear to me. It does seem to me that the Judge who tried the case is the one to decide the matters which you have submitted to me this morning. I did

not say anything about it probably because I did not think of it and because both sides seemed to feel that this was the proper tribunal—proper Judge—to bring the matter before. But if there is any question about what Judge Holtzoff did or what he thought should be in the record, it seems to me that you ought to take it up with him.

Mr. MALETZ: I made my statement only to correct what Mr. Morgan has referred to as my conversation with Judge Holtzoff. I think that Mr. Morgan's recollection of the matter is extremely faulty.

Mr. MORGAN: I do not believe there will be any necessity to refer this, especially inasmuch as counsel has indicated —and naturally I did not hear it—his conversation with Judge Holtzoff. I was merely repeating what was said.

But he bears out the fact that Judge Holtzoff
1244 agrees with your Honor that that is not properly a part of the record.

(At 10:30 a. m. the hearing was concluded.)

Reporter's Certificate to foregoing transcript omitted in printing.

1246 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(File Endorsement Omitted)

UNITED STATES OF AMERICA,
PLAINTIFF

v.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, WASHINGTON REAL ESTATE BOARD, HERBERT U. NELSON, and J. GARRETT BEITZELL, LEWIS T. BREUNINGER, LEWIS F. COLBERT, S. DOLAN DONOHOE, C. H. HILLEGEIST, EDWARD K. JONES, WILLIAM L. LEBLING, S. MILES MONTGOMERY, F. MORAN MCCONIHE, WILLIAM L. OREM, JR., THOMAS W. SANDOZ, J. HAWLEY SMITH, RAYMOND M. TAYLOR, DEVERE R. WEEDON and CAREY WINSTON, Individually and as representing a class consisting of all members of WASHINGTON REAL ESTATE BOARD,

DEFENDANTS

Complaint For Violation Anti Trust Law—Filed August 27, 1947

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the

United States, brings this civil action against the defendants above-named and complains and alleges, upon information and belief, as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the above-named defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," said Act being commonly known as the "Sherman Act," in order to prevent continued violations by said defendants, as hereinafter alleged, of Section 3 of the Sherman Act.

2. The defendant Washington Real Estate Board (hereinafter referred to as "Washington Board") is an inhabitant of the District of Columbia. National Asso-
1247 ciation of Real Estate Boards (hereinafter referred to as "National Association") is a corporation that transacts business and is found within the District of Columbia. Each of the individuals named as defendant herein is an inhabitant of or is found in the District of Columbia.

DESCRIPTION OF DEFENDANTS

3. Defendant National Association is a corporation organized in 1908 and existing by virtue of the laws of the State of Illinois. It is a national trade association comprised of (1) approximately 28,000 real estate brokers and others affiliated with real estate business throughout the United States including the District of Columbia, and (2) approximately 800 local associations of real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia. Herbert U. Nelson is and has been for many years Executive Vice-President and Executive Secretary of defendant National Association.

4. Defendant Washington Board is a corporation organized in 1928 and existing by virtue of the laws of the District of Columbia. It is a successor to an unincorporated association of real estate brokers known as Real Estate Brokers Association of Washington City, D. C., organized in the District of Columbia in 1913. Said Washington Board is a trade association with a membership consisting of approximately 250 real estate brokers and others affiliated with the real estate business, including several banks, building and loan associations, life insurance companies, and

title companies, all doing business in the District of Columbia. Washington Board and all members thereof are members of the National Association.

5. Except for defendant Nelson each of the individual defendants named in this complaint is and has been a member of the Board of Directors of the Washington Board and is associated with a real estate brokerage firm or financial institution that is a member of the Washington Board.

1248 6. All of the present members of the Washington Board, other than those members specifically named herein as defendants, are hereby sued as a class. They constitute a class of persons having identical interests in the subject matter of this action and are so numerous as to make it impractical to bring them all before the court. Insofar as the character of the right sought to be enforced against them by this action is several, the questions of law and fact affecting their several rights are common and common relief is sought against them. The joinder of the Washington Board and those of its members hereinbefore specifically named as parties defendant, will fairly insure the adequate representation of all other members of the Washington Board.

7. Various persons not made defendants herein participated as co-conspirators with the defendants in the offenses hereinafter charged, and performed acts and made statements in furtherance of the effectuation thereof. These co-conspirators include (a) those who have been officers and members of the Washington Board and individuals who, from time to time, acted as the representatives of the members in meetings and other activities of the Washington Board, and (b) those who have been officers, directors and members of committees of the National Association.

NATURE OF TRADE AND COMMERCE

8. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.

1249 9. Due to the transient nature of a large percentage of the population of the District of Columbia, a particular parcel of real estate or apartment may be sold,

leased, or rented by a broker to a great number of purchasers, lessees or tenants within a short period of time. A brokerage commission or fee is realized from each such sale or lease.

10. Under present market conditions the demand for residential and commercial properties in the District of Columbia is greater than the available supply. Purchasers or tenants are readily available to brokers acting as agents for the sale or rental of residential and commercial properties in the District of Columbia. The compensation of said brokers is in the form of a commission determined by a percentage of the sales or rental price regardless of the nature and amount of services rendered by said brokers.

Offenses Charged

11. For many years up to and including the date of filing this complaint, the defendants and others have been and now are engaged in a combination and conspiracy to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property and the improvements thereon, all in violation of Section 3 of the Act of Congress July 2, 1890, as amended, entitled "An Act to protect trade, and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act. Said unlawful combination and conspiracy is continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

12. By agreeing to observe and by observing the Constitution, By-Laws, Code of Ethics, and other rules of the Washington Board and of the National Association, as amended from time to time, and by performing the Acts and engaging in conduct hereinbefore and hereinafter alleged, the defendants and their co-conspirators have
1250 continuously planned and acted together to discourage members of the Washington Board from charging rates of commission other than those fixed by said Washington Board.

13. The aforesaid combination and conspiracy, and the acts, agreements and understandings which formed a part of and were used in effectuation thereof, have been carried out by divers means and methods including those hereinafter described.

A. Commission Rate Fixing Generally

14. For many years prior to January 1, 1947 the National Association had a Committee on Rates, Rules and Customs. One of the purposes of said Committee was to

raise brokerage commission rates and achieve uniformity in said rates throughout the United States including the District of Columbia. Said Committee made studies of brokerage commission rates prevailing in various States of the United States and in the District of Columbia, and thereafter initiated a plan to raise rates of commission charged by various members of the National Association throughout the United States, including those doing business in the District of Columbia, and to achieve uniformity in those rates.

15. In accordance with the recommendations of the National Association, the Washington Board, as hereinafter set forth, increased the rates established in its schedule of commissions.

16. Members of the Washington Board agree as a condition of membership in the National Association to abide by the Code of Ethics of the National Association. Article 9 of this Code requires each member of each local real estate board, including the Washington Board, to observe the schedule of commissions established by the local board of which each is a member.

1251 17. Article 14 of the Constitution and By-Laws of the Washington Board provides that said Board may adopt specific rules of practice or "ethics" and that any such rules, when adopted, are binding on each member. In accordance with this provision, the Washington Board has adopted a schedule of commissions which fixes the standard rates of commissions to be charged by its members for acting as agents in the sale, exchange, lease and management of real property in the District of Columbia.

18. Section 3 of the Code of Ethics of the Washington Board provides:

> Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates.

All members of the Washington Board agree and have agreed as a condition of membership to abide by this Code of Ethics, and in accordance therewith, said members adhere and have adhered to the schedule of commissions established by the Washington Board.

19. On February 16, 1943 the schedule of commissions, which had been in effect for several years, was revised by the Washington Board and the members thereof agreed to adhere and have generally adhered to the new schedule. This revised schedule substantially increased the commission rates required to be charged by the members of said Washington Board.

B. Commission Rate Fixing on Sales of Real Estate

20. The schedule of commissions of the Washington Board which had been in effect prior to February 16, 1943 required each of its members, when acting as agent in the sale of real estate in the Washington city area, which included most of the District of Columbia, to charge a rate of commission of 5% on the first $5,000 of the sales price, and an additional 3% on the excess above $5,000.

1252 21. On February 16, 1943 a new schedule increasing these rates was approved at a special meeting of the Washington Board. This schedule provided in part as follows:

> The commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000 and 3% on the excess above $50,000.

22. In addition to the provisions in the schedule fixing rates of commission on sales of real estate, the Washington Board issues a standard form sales contract which is generally used by real estate brokers in the District of Columbia. This contract contains the following provision with respect to rates of commission:

> The seller agrees to pay to Agent the regular rate of Commission fixed by the Washington Real Estate Board.

C. Commission Rate Fixing on Exchange of Real Estate

23. For several prior to February 16, 1943 the schedule of commissions adopted by the Washington Board required its members when acting as agents in the exchange of real property in the city area of the District of Columbia to charge each owner a rate of commission of 2½% of the exchange price of the lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 3%.

24. The new schedule which was approved on February 16, 1943 provided in part as follows:

> In the exchange of real estate within the District of Columbia, a commission shall be charged each owner, at the rate of 2½% of the exchange price of lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 5% up to and including $50,000 and 3% for the amount above $50,000 if located within the District of Columbia.

D. Commission Rate Fixing on Leases

25. The schedule of commissions adopted by the Washington Board in or about 1931 fixed the rate of com-

1253 mission to be charged by a member broker for securing a tenant or negotiating a lease for business properties, where the broker did not collect the rent or manage the property, at one half of the first month's rent if the term of the lease was less than two years, and at 2½% of the gross total rent for the entire term of the lease for leases of two years or longer. Where the lease was in excess of twenty-one years, the rate of commission was fixed at 2½% of the gross rental for the first twenty-one years, 1% for the next twenty-one years, and ¼% for any additional period. The commission for the sale of a lease was fixed at 10% on the first $50,000 and 5% on the balance. This schedule of commissions further fixed the rate of commission for securing a tenant or negotiating a lease for residential properties, where the broker did not collect the rent or manage the property, at one half of the first month's rent where the term of the lease was less than two years, and 2½% of the gross total rent for the entire term where the lease was two years or longer.

26. The schedule of commissions of the Washington Board now in effect fixes the following rates of commission to be charged by a member broker for securing a tenant or negotiating a lease for business properties where the broker does not collect the rent or manage the property:

1. Monthly tenancy: One-half of first month's rent.
2. Leases: One year: 5%.
3. Leases: Term

First year	5%
Next 20 years	2½%
Next 21 years	1%
Next 21 years	½%
Any period beyond 21 years	¼%

Said schedule of commissions now in effect fixes the following commission rates with respect to percentage leases:

1254 5. Percentage leases: With minimum guarantee the commission shall be 5% for the first year and 2½% of the minimum rental for the next 20 years of the lease, payable at time lease is signed. In event lessee pays additional rentals over and above minimum guaranteed rental, the broker shall at the time of payment of such rentals be entitled to additional commissions of 5% of amount collected.

Without minimum guarantee, the commission shall be 5% of the total rentals for the full term of the lease, payable at the time of payment of such rentals.

Said schedule fixes the rate of commission for the sale of a lease of a business at 10% on the first $50,000 and 5% on the excess over $50,000. Said schedule of commissions fixes the rates for securing a tenant or negotiating a lease for residential properties, where the member-broker does not collect the rent or manage the property, at one-half of the first month's rent for a monthly tenancy or lease for one year, and for a lease exceeding one year at 5% for the first year and thereafter 2½% of the gross rent for the balance of the term of the lease.

E. Commission Rate Fixing on Management of Real Estate

27. The schedule of commissions fixes the rate of commission for collection of rents and management of commercial and residential properties as follows:

The commission for collection of rents and management of property shall be 5% of the gross rent, payable as collected, for all classes of property up to $100,000 annually. This provision shall apply not only to the original lease but to any extensions or renewals thereof, or where the lesse remains in possession beyond the term of the original lease.

On an individual building or project where the gross annual rental exceeds $100,000.00 commission on the excess shall be subject to agreement.

Minimum commission on all rentals under $20 per month shall be $1.00.

1255 Effects of Offenses Charged

28. The aforesaid combination and conspiracy, agreements, understandings and concert of action hereinbefore alleged, have had, as intended by the defendants, the following effects:

(a) Competition between the individual defendants (other than Nelson) in determining fees to be charged for selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia has been eliminated.

(b) The amounts paid for commissions to brokers for the sale of houses in a large part of the District of Columbia have increased 25% to 50%.

(c) The activities and business policies of real estate brokers engaged in selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia have been actively and effectively restricted and dominated.

Prayer

Wherefore, plaintiff prays:

1. That the acts of the defendants hereinbefore described constitute a combination and conspiracy in restraint of trade and commerce of the District of Columbia in violation of Section 3 of the Sherman Act.

2. That each and every provision of the Constitution, By-Laws, Code of Ethics, or other rules and regulations of the National Association which in any way requires, directly or indirectly, that members of Washington Board adhere to rates or schedules of commission established by the Washington Board or the National Association be declared illegal, null and void and in violation of the Sherman Act.

3. That each and every provision of the Constitution, By-Laws, Code of Ethics, or other rules and regulations of the Washington Board which establishes any schedule of commissions or fixes any rates of commission or other fees to be charged by its members be declared illegal, null and void and a violation of the Sherman Act.

1256 4. That the defendants and each of them, and each and all of their respective officers, directors, managers, agents, employees, and all persons acting or claiming to act on behalf of them, or any of them, be perpetually enjoined individually and collectively, from further engaging in, agreeing to perform, or in fact performing, said conspiracy or any part thereof, or any other conspiracy of like character or effect, or any of the acts, agreements, understandings, or concert of action described in this complaint.

5. That the plaintiff have such other, further, general and different relief as the case may require and the Court may deem just and proper in the premises.

6. That the plaintiff recover its taxable costs.

Dated: Washington, D. C.
August , 1947

Tom C. Clark
Tom C. Clark
Attorney General

John F. Sonnett
John F. Sonnett
Assistant Attorney General

G. Morris Fay
G. Morris Fay
United States Attorney

Victor H. Kramer
Victor H. Kramer

Herbert N. Maletz
Herbert N. Maletz
Special Assistants to the Attorney General

1264 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Answer of the National Association of Real Estate Boards and Herbert U. Nelson—Filed Dec. 1, 1947

FIRST DEFENSE

Comes now the National Association of Real Estate Boards and Herbert U. Nelson, Defendants, and for their First Defense they say that the Complaint fails to state a claim against these Defendants upon which relief can be granted.

JURISDICTION AND VENUE
SECOND DEFENSE

1. Answering Paragraph 1 thereof, these Defendants say that the same being averments of law they are not required to answer.

2. Answering Paragraph 2 of said Complaint, these Defendants admit that the National Association is a
1265 Corporation that may be said to be found within the District of Columbia but deny that it transacts business therein. The Defendant Herbert U. Nelson denies that he is an inhabitant of or, except on occasions, is to be found in the District of Columbia. He says that he is a resident of and is employed in the State of Illinois.

3. Answering Paragraph 3, these Defendants admit all allegations of fact therein set forth.

4. Answering Paragraph 4, these Defendants, upon information and belief, admit that the facts therein set forth are substantially true, except that only active members of the Washington Board are members of the National Association.

5. These Defendants have no knowledge as to the allegations of Paragraph 5.

6. These Defendants are advised that the allegations of this Paragraph are averments of law, and, therefore, they are not required to make answer thereto.

7. These Defendants deny the allegations of this Paragraph and specifically deny that any conspiracy was ever entered into by or between the officers and directors and members of committees of the National Association at this or any other time.

8. Answering Paragraph 8, these Defendants say that they are without knowledge as to the number of parcels of real estate sold and leased in the District of Columbia in the year 1946. Upon information and belief, these Defendants deny that the members of the Washington Real Estate Board control at least 50 percent of the total volume of the dealings in relation to real estate in the District of Columbia. Upon information and belief, they allege that less than 20 percent of those licensed to engage in the real estate business in the District of Columbia are members of or affiliated with the Washington Real Estate Board. These Defendants further deny that the members of the Washington Real Estate Board, acting in the manner in
1266 which they carry on the sale, exchange, lease and management of real estate and give advice and counsel with respect thereto, are engaged in trade or commerce in the District of Columbia.

9. These Defendants deny the allegations and inferences attached to Paragraph 9 and even, if true, deny their materiality to the matters and things alleged in the aforesaid Bill of Complaint.

10. Answering Paragraph 10, these Defendants, upon information and belief, deny the essential allegations thereof, together with their materiality.

They further deny that at present the demand for residential and commercial property in the District of Columbia is greater than the supply, except as to rental properties, and the rental of these is fixed by law. These Defendants deny that the commission of brokers is determined solely by a percentage of the sale or rental price. No commission is payable to brokers unless the services of the brokers are satisfactory in that they secure purchasers or lessees who are ready, willing and able to make the purchase or enter into a lease.

11. These Defendants deny each allegation of fact and each inference in said Paragraph contained.

12. These Defendants deny the allegations of Paragraph 12 insofar as the same may be alleged to apply to them and, upon information and belief, they deny the allegations insofar as they may relate to the defendant the Washington Real Estate Board and others.

13. Insofar as these averments are matters of law, Defendants are advised that they are not required to make answer thereto, but they deny any and all allegations of fact therein.

14. These Defendants admit and agree that for many years prior to January 1, 1947 the National Association had various committees on rates, rules and customs. These Defendants deny that the purposes of the committees were to raise brokerage commission rates and achieve uniformity in the said rates throughout the United States, in-
1267 cluding the District of Columbia, as in the manner and form alleged in said Paragraph. These Defendants further say that from time to time the various committees of the National Association did make studies of brokerage commission rates prevailing over the United States and from time to time prepared reports of the said studies which were distributed not only to existing real estate boards who were members of the National Association but also to new boards which were being formed throughout the United States. The National Association offered these studies as guides to the various real estate boards and to their members in order that all of the brokers throughout the United States might be informed as to the fees and charges made generally throughout the United States for services rendered in connection with real estate, its sale, leasing and financing by brokers, both members of the National Association and non-members thereof. These studies were made from time to time in response to complaints and requests of agencies of Government, including F.H.A., H.O.L.C., the various purchasing boards and commissions of Government and of the Army and Navy Departments, who desired and insisted upon some measure of definiteness as to standards of compensation for identical services performed with respect to real estate throughout the United States. The National Association and its Executive Vice President deny that its efforts in this regard were to raise rates of commission charged throughout the United States or in the District of Columbia. It was the effort of the National Association to suggest standards of compensation for the various services performed by real estate brokers that were regarded as reasonable in order to prevent unfair practices, imposition, unfair dealing and fraud upon the buying, selling and investing public and to so inform the public so that it would have some knowledge of what seemed to be fair standards of compensation to brokers for services performed with respect to real estate. The National Association never urged its members to compel observance of these or any other rates or charges and, as a matter of fact, brokers and the

1268 public in the District of Columbia and over the United States use them only as guides and for information. These Defendants deny that they ever suggested to the brokers in the District of Columbia or to members of the Washington Real Estate Board that their rates should be increased and they further deny that they ever had knowledge of any increase in the rates of compensation as in the Bill of Complaint alleged.

15. Answering Paragraph 15, these Defendants deny that the Washington Board allegedly increased its rates by reason of any recommendations of the National Association and further deny that they ever had knowledge either of the existing rates or of any alleged increases thereof from time to time.

16. Answering Paragraph 16, these Defendants admit that as a condition of membership in the National Association the members of the Washington Board agree to abide by the Code of Ethics of the National Association. These Defendants admit that the Code of Ethics of the National Association, Part I, Article 9, reads as follows: "The schedule of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every realtor." These Defendants deny that the aforesaid Article 9 requires each member of the local real estate boards to observe the schedule of commissions established by such boards throughout the United States.

17. Answering Paragraph 17, these Defendants say that they were without knowledge of the matters and things therein alleged until filing of this Bill of Complaint but, upon information and belief, they deny the allegations thereof.

18. These Defendants aver that they had no knowledge of Section 3 of the Code of Ethics of the Washington 1269 Board until the filing of the petition herein. These Defendants have no knowledge either as to the alleged binding character of the said Section 3 of the Code of Ethics or as to the manner and circumstances under which the said Section has been interpreted or complied with.

19. Answering Paragraph 19, these Defendants say that the only knowledge that Defendants had of the schedule of commission that obtained prior to February 16, 1943 grew out of the survey made by the committees on rates, rules and customs of the National Association prior to 1941. This information was purely statistical and did not come to

the knowledge of the officers of the National Association. These Defendants did not know of the revision by the Washington Board of its rates schedule on February 16, 1943 until the filing of the petition herein. These Defendants did not know whether the members of the Washington Board agreed to adhere to the said standard schedule and have no knowledge as to whether or not the members have adhered to the new schedule or, as a matter of fact, to the old one. These Defendants have no knowledge as to whether or not the revised schedule of February 16, 1943 increased or decreased the commission paid to members of the Washington Board.

20-21-22-23-24-25-26-27. Answering the aforesaid Paragraphs, these Defendants say that they were without knowledge of the various rates suggested by the Washington Board for its members as standard rates for the services in said Paragraphs referred to. They had no part in establishing the same, they had no knowledge of any changes with respect thereto and, upon examination and comparison thereof, these Defendants say that the aforesaid rates as alleged in said Paragraphs are in substantial variation from rates prevailing in various portions of the United States and also in variation from any reports or information from time to time sent out over the years by the National Association for the various constituent boards.

These Defendants deny the allegations of Paragraph
1270 27 that indicate that the schedules of the Washington Board "fix" the rate of commission for brokers' services.

28. These Defendants deny all statements of fact set out in this Paragraph and, insofar as certain allegations are conclusions of law, they are advised that they are not required to make answer thereto.

Third Defense

Defendants deny that the action of a person, whether a member or non-member of the Washington Real Estate Board, acting as a principal in buying, selling, leasing, exchanging or securing the management of real property and improvements thereon in the District of Columbia or any of the acts alleged in the Complaint herein constitutes trade or commerce in the District of Columbia or between the District of Columbia and the several States.

Fourth Defense

Defendants deny that the acts of brokers handling their affairs as they do in the District of Columbia in securing

for principals the purchase, sale, lease or exchange of real estate or in the management thereof or in contracting to do any of the foregoing or any of the acts alleged in the Complaint constitutes trade or commerce in the District of Columbia or between the District of Columbia and any of the several States.

FIFTH DEFENSE

The publication by the Washington Real Estate Board of a schedule of standard commissions or charges which is no more than a public statement of average commissions and charges obtaining generally in the District of Columbia and which are recommended as fair compensation in the public interest constituted a reasonable action designed to prevent practices detrimental both to the public and to its members. The publication to the Washington Real Estate Board by the National Association of information as to rates, commissions and charges obtaining generally over the United States as a guide to the Washington Real Estate Board and other boards over the United
1271 States in order that the public might be informed as to reasonable charges for real estate brokers' services and thereby protected from extortionate and unwarranted charges and profits is in the public interest.

SIXTH DEFENSE

The acts charged against these Defendants do not constitute an unreasonable restraint of trade or commerce within the meaning of the Sherman Act as amended.

These Defendants aver that none of their acts as alleged herein could or do constitute a restraint upon a principal in buying, selling, exchanging, leasing or operating for profit, real estate in the District of Columbia.

These Defendants aver that numerous transactions in buying, selling, exchanging, leasing or operating for profit in real estate in the District of Columbia are carried on by the principals themselves or in their behalf by more than a thousand licensed real estate brokers and salesmen in the District of Columbia who are not members of the Washington Real Estate Board.

SEVENTH DEFENSE

Defendants aver that the business of representing principals in the purchase, sale, exchange, lease or management of real estate in the District of Columbia is highly competitive; that Defendants do not and cannot control a

substantial portion of the said business and that the alleged "fixing" of a schedule of standard commissions does not constitute factual or illegal "price fixing" or other illegal restraint within the meaning of the law, or a conspiracy directed thereto.

EIGHTH DEFENSE

The members of the Washington Board and the National Association are realtors who possess special knowl-
1272 edge and capacity to render services in their field. The realtors in the District of Columbia are for the most part especially trained in the matters of property management, real estate values and appraisals, business trends and values in the District of Columbia, and are qualified and do give professional advice and counsel with respect to ownership, purchase, sale, management and financing of real estate. For the performance of these services and in order to follow a reasonable standard or basis that could be generally understood by the public, it has been the custom and practice of real estate brokers not only in the District of Columbia but elsewhere throughout the United States to charge rates of commission based upon the values of the properties involved. Similar professional practice exists in the fields of architecture, engineering, insurance, business advice and counsel, and have become a standard for the public in its dealings in such matters. The rates set forth in the schedule constitute an offer to prospective clients and principals to perform services at the rate specified, which clients or principals are free to accept or reject as they see fit or to make other and different arrangements in the employment of the services of realtors or any other real estate broker. In the event the said clients or principals reject the employment of realtors at the proposed rates or any others, the services of other capable persons not members of the Defendant organizations are freely available. These Defendants have no capacity, actual or potential, or intentioned, to achieve a monopoly, to fix prices or fees for their services or to eliminate competition or to increase or decrease by reason thereof the sale or rental price of real estate in the District of Columbia.

These Defendants further aver that it has been the purpose, intention and accomplishment of the National Association in any and all things that it has done, and more particularly as to any and all things with which it is charged in this Bill of Complaint, to urge upon and require of its

more than 40,000 members throughout the United
1273 States, including approximately 250 in the District of Columbia, the establishment of high standards and the highest of integrity and faithfulness in the performance of their duties and obligations as trustees for their principals in all things relating to real estate. The Defendant National Association has accomplished much toward the elimination of unfair and unethical conduct toward the public by real estate brokers. Until the filing of this Bill of Complaint and its indictment in the District of Columbia concurrently therewith, no Government official had ever indicated that this Defendant's Code of Ethics or by-laws were illegal or tended to create a monopoly or eliminate competition in the District of Columbia. All of the documents and correspondence and files of the National Association, as well as those of the Washington Board, were made freely available to the agents and attorneys of the Department of Justice early in the spring of 1946 and their examination was completed at that time. No complaint or suggestion of any character with respect to the procedures, by-laws or Code of Ethics was ever made by the Department of Justice or its agents to the National Association or to the Washington Board, nor was any suggestion or criticism made so that any of these Defendants could have the benefit of helpful and critical suggestions that would, in the opinion of the Department of Justice, improve its procedures. All of the information remained in the files of the Department of Justice for approximately 1½ years before either the indictment of these Defendants or the filing of this Bill of Complaint. These Defendants, therefore, say that this Bill of Complaint has not been filed by reason of any sincere desire on the part of the officials of the Department of Justice to remedy what the Government may contend are illegal practices in the District of Columbia. The Code of Ethics and by-laws of the National Association were written and the efforts of the National Association have been planned and directed in behalf of all of the real estate brokers and the public in the entire United States. No action or intention of the National Association was in any way directed to the District of
1274 Columbia or the brokers therein other than as applied to the entire country.

NINTH DEFENSE

The members of the Washington Board constitute a small proportion of the licensed real estate brokers of the Dis-

trict of Columbia and an insignificant fraction of the membership of the National Association and no acts of said members can constitute a conspiracy to restrain or a restraint upon trade or commerce.

TENTH DEFENSE

Defendants deny that the constitution, by-laws and Code of Ethics of the National Association required members of the Washington Real Estate Board or any other board to maintain rates and commissions adopted by said Board and aver that the sole agreement of members is contained in Article 9 of the Code of Ethics of the National Association, reading as follows:

> "The schedules of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor."

Defendants aver that the above-quoted provision was advisory and was intended to represent the basis of a comparable standard for fees and charges, was advisory in character and not mandatory, has always been so construed by the National Association and that no penalty for violation thereof was prescribed or enforced by the National Association and so far as the National Association has been informed, believes and, therefore, avers, no member of the Washington Board has ever been disciplined in any manner or form for having charged fees, rates or commissions either less than or in excess of the standard rates suggested. The National Association further alleges that it has no practical means or instrumentality by which it may enforce compliance by any member of the Washington Real Estate Board with any rates, fees or charges that may from time to time be suggested by the Washington Real Estate Board.

1275 ELEVENTH DEFENSE

The National Association engages in no activity that constitutes trade or commerce in the District of Columbia. The actions of members of the Washington Board who happen thereby to be members of the National Association in representing principals in the purchase, sale, exchange, lease and management of real estate constitute a rendition of personal services professional in character and limited in each instance to the particular transaction and do not constitute trade or commerce in the District of Columbia or between the District of Columbia and any of the several States.

TWELFTH DEFENSE

Defendants aver that the Congress by legislation specifically applicable to the District of Columbia, the Real Estate Brokers and Business Chance Brokers License Law for the District of Columbia has established a comprehensive plan for the regulation of real estate brokerage in the District of Columbia. The said law establishes a real estate commission of the District of Columbia with power to issue licenses to real estate brokers permitting them to act as such in the said District and with power to revoke their said licenses for misconduct specifically set forth in the said Act. Defendants aver that the Congress by the said Act has enforced, ratified and confirmed the schedule of standard commissions in the District of Columbia heretofore established by custom, practice and usage and published and recommended by the Washington Board as fair compensation in the public interest.

ROGER J. WHITEFORD
Roger J. Whiteford

JOHN J. WILSON
John J. Wilson
815—15th Street, N. W.
Washington, D. C.
Attorneys for Defendants
National Association of Real Estate Boards
and Herbert U. Nelson

1276 I hereby certify that on the first day of December, 1947, I mailed copies of the foregoing answer to the following, addressed to them at their respective offices in the District of Columbia; Victor Kramer, Esq., Department of Justice, of counsel for the Plaintiff; William E. Leahy, Esq., 821—15th Street, N. W., of counsel for the defendants, Washington Real Estate Board, and other individual defendants with the exception of defendant J. Hawley Smith; and A. K. Shipe, Esq., National Press Building, Washington, D. C., attorney for defendant J. Hawley Smith.

JOHN J. WILSON
John J. Wilson

1277 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Answer of J. Hawley Smith—Filed Dec. 1, 1947

Comes now the defendant, J. Hawley Smith, by his attorneys, and for answer to the complaint, says,

1. The defendant, J. Hawley Smith, incorporates herein and adopts as his answer the joint and several answers, and all defenses set out therein, of the defendants, with the exception of National Association of Real Estate Boards and Herbert U. Nelson.

WALTER M. BASTIAN
Walter M. Bastian

A. K. SHIPE
A. K. Shipe
Attorneys for Defendant
J. Hawley Smith
National Press Building
Washington 4, D. C.

I certify that I have served the foregoing answer by mailing a copy thereof, postage prepaid, to Hon. Tom C. Clark, Attorney General of the U. S., Department of Justice, Washington, D. C., and Hon. G. Morris Fay, U. S. Attorney, Courthouse, Washington, D. C., attorneys for plaintiff; William E. Leahy, Esq., and William J. Hughes, Jr., Esq., 821-15th St., N. W., Washington, D. C., attorneys for defendants other than National Association of Real Estate Boards and Herbert U. Nelson; Whiteford, Hart, Carmody and Wilson, 815-15th St., N. W., Washington, D. C., Attorneys for defendants National Association of Real Estate Boards and Herbert U. Nelson, this 1st day of December, 1947.

A. K. Shipe
Attorney for Defendant J. Hawley Smith

1278 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Joint and Several Answer—File Dec. 1, 1947

Come now defendants, by their attorneys, with the exception of National Association of Real Estate Boards, Herbert U. Nelson, and J. Hawley Smith and for Answer to the Complaint, herein show:

FIRST DEFENSE

The Complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

1. The allegations of this paragraph being averments of law, defendants are advised that they require no answer.

2. Defendants admit the allegations of this paragraph except the allegations referring to the National Association, as to which defendants are without knowledge or information sufficient to form a belief.

3. As to the allegations of this paragraph, defendants are without knowledge or information sufficient to form a belief, except the allegations as to defendant Nelson which are admitted.

4. Defendants admit the allegations of this paragraph except the allegation that all members of the Washington Board are members of the National Association. Defendants aver the active members of the Washington Board are members of the National Association. Associate members, *i. e.* employees of active members, are not members of the National Association.

1279 5. Defendants admit the allegations of this paragraph.

6. The allegations of this paragraph being averments of law, defendants are advised that they are not required to answer them.

7. Defendants deny the allegations of this paragraph and specifically deny that any conspiracy was entered into or exists.

8. Defendants admit the allegation of this paragraph except insofar as they allege that members of the Washington Board control at least 50% of the total volume of sale.

exchange, lease and management of real estate in the District of Columbia, which allegation is denied. Defendants deny that the sale, exchange, lease or management of real estate for a commission or fee in the District of Columbia constitute trade or commerce in the District of Columbia.

9. Defendants deny the allegations of this paragraph.

10. Defendants deny that under present market conditions the demand for residential and commercial property in the District of Columbia is greater than the available supply except insofar as rental properties are concerned and then only in the event that the rent is satisfactory to the tenant. Defendants further deny that a demand for the purchase of residential and commercial properties herein exists, irrespective of a price satisfactory to the purchaser.

Defendants deny that purchasers or tenants are readily available to brokers acting as agents for the sale or rental of residential or commercial properties but admit that prospective purchasers or tenants are available where the price of the property or the rental price is satisfactory to the purchaser or tenant. Defendants aver that at present and for sometime past the alleged demand for sale or exchange of residential and commercial property has decreased and is decreasing.

Defendants deny that the commission of said brokers is determined by a percentage of the sale or rental price regardless of the nature or amount of services rendered by the said brokers. Defendants aver that no commission whatsoever is paid or payable to the said brokers, except in the event an actual sale, lease or exchange is consummated, and unless the services of the said brokers are satisfactory to the vendors or lessors of the said property.

11. Defendants deny the allegations of this paragraph.

12. Defendants deny the allegations of this paragraph.

13. The allegations of this paragraph being averments of law defendants are advised that they are not required to answer them; insofar as this paragraph purports to allege facts, it is denied.

14. Defendants admit that for many years prior to January 1, 1947, the National Association had a Committee on Rates, Rules and Customs. Defendants deny that one of the purposes of said Committee was to raise brokerage commission rates and achieve uniformity in said rates throughout the United States including the District of Columbia. Defendants admit that the said Committee made studies of brokerage commission rates prevailing in

the various States and in the District of Columbia. Defendants deny that the said Committee thereafter initiated a plan to raise rates of commissions in the United States and in the District of Columbia or to achieve uniformity in those rates.

1280 15. Defendants deny the allegations of this paragraph. Defendants deny that any schedule of standard commissions was adopted in accordance with the recommendations of the National Association and deny that any such schedule increased over-all rates.

16. Defendants admit that members of the Washington Board agree as a condition of membership in the National Association to abide by the Code of Ethics of the National Association. Defendants deny that Article 9 of this Code requires each member of the Washington Board to observe the schedule of commissions established by the local Board and aver that Article 9 is not mandatory in character but merely expressive of policy and in practice has always been so construed. The said Article 9 is without penalty either prescribed or enforced.

17. Defendants admit that Article 14 of the Constitution and By-laws of the Washington Board states that specific rules of practice and ethics when adopted are binding on each member but aver that the only such rule applicable to rates of commissions is Rule 3, paragraph 1 of the Code of Ethics set forth in paragraph 18 hereof which is non-mandatory in character and has always been so construed.

Defendants admit that the Washington Board has adopted a schedule of commissions setting forth standard rates of commissions but deny that the said schedule "fixes" such rates. Defendants aver that the said schedule merely sets forth standards which contemplate observance or non-observance depending upon the desire of the parties concerned as circumstances may suggest, and that the said "standard rates" are non-mandatory in character, have always been so construed, and merely set forth a basis upon which to estimate fair compensation in the public interest. Insofar as the allegations of this paragraph purport to allege "price fixing" within the meaning of the Sherman Act as amended, they are denied.

18. Defendants admit that all members of the Washington Board agree and have agreed as a condition of membership to abide by Section 3 of the Code of Ethics reading as follows:

"Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates."

but aver that the said Section is not mandatory in character but merely expressive of policy, and has always been so construed and is without penalty either prescribed or enforced.

Defendants deny that said members adhere to and have adhered to the schedules of commissions and aver that the alleged "schedule of commissions" was merely a schedule of rates of standard commissions as alleged in paragraph 17 hereof. Defendants aver it is common practice to depart from the said schedule of standard commissions and aver it has never been adhered to.

19. Defendants admit that on February 16, 1943, the schedule of standard rates of commissions was revised by the Washington Board. Defendants deny that "the members thereof agreed to adhere and have generally adhered" to the new schedule of standard commissions but in respect thereof aver they were guided by paragraph 1, Section 3 of the Code of Ethics quoted in Paragraph 18 hereof as construed and applied as set forth therein.

1281 Defendants deny that the revised schedule substantially increased the commission rates required to be charged by members of the said Washington Board from an over-all viewpoint and deny that the said schedule of standard commissions were "required" to be charged by the members of the said Washington Board.

Defendants aver that the schedule of standard commissions of February 16, 1943, was designed to eliminate inequalities in standard commissions which were theretofore based on geographical areas and did in fact eliminate such inequalities.

20. Defendants deny that the schedule, in effect prior to February 16, 1943, which defendants aver was a schedule of "standard" commissions, "required" its members to adhere to it. Defendants aver that the schedule set forth in paragraph 20 of the Complaint is incomplete and aver that the true schedule of standard commissions, covering sales prior to February 16, 1943, was established by custom, practice and usage and merely published to members and interested parties November 23, 1917 as follows:

"Five per cent on all sales in Cleveland Park, Saul's Addition, Chevy Chase, Bradley Hills, Brightwood, Takoma Park, Brookland and similar vicinities.

"Five per cent on sales of $5,000 and less, in City area, with 3% additional charged on the excess above $5,000.

"Minimum commission for any sale, $50.00."

Defendants aver the rates above quoted were construed as maximum rates and that in a substantial number of instances the rates finally charged were less than those above quoted.

21. Defendants admit the allegations of paragraph 21 except insofar as they allege the new schedule increased prior rates. Defendants aver that from an over-all viewpoint the rates were not substantially increased and that the said rates were "standard commissions".

Defendants further aver that the original rates were established by custom, practice and usage and that the new rates were reasonable rates recommended in the public interest as reasonable compensation. The said rates resulted from the desire to eliminate inequalities, the increased cost of living, increased costs of doing business, the imposition of new and additional taxes, increased advertising costs and other costs over which defendants had no control. Defendants aver the rates above quoted were construed as maximum rates and that in a substantial number of instances the rates finally charged were less than those above quoted.

22. Defendants admit the allegations of this paragraph except insofar as they allege that the said schedule fixes rates of commissions which is denied. Defendants deny the standard form of sales contract is "generally" used.

23. Defendants deny that prior to February 16, 1943, the schedule of commissions set forth in this paragraph constituted the complete schedule of standard commissions of the Washington Real Estate Board covering exchanges and deny that the said alleged schedule of commissions "required" its members to adhere to it. Defendants
1282 aver that the true schedule of standard commissions covering exchanges prior to February 16, 1943, was established by custom, practice and usage and merely published by the Washington Real Estate Board to its members and other interested parties November 23, 1917, as follows:

"Two and one-half per cent charged each side on the amount of lower valued property in the exchange, with an additional charge against the owner of the higher valued property for the excess at the rate of 3% if located in City area and 5% if in Suburban area.

"Minimum commission for any exchange $100.00 each side."

Defendants aver the rates above quoted were construed as maximum rates and that in a substantial number of instances the rates finally charged were less than those above quoted.

24. Defendants admit the allegations of this paragraph but aver that the said schedule set forth commissions as "standard commissions" covering exchanges.

Defendants aver that the original schedule of standard commissions was established by custom, practice and usage prior to February 16, 1943 and that the new rates were reasonable rates and recommended as fair compensation in the public interest. The said rates resulted from the increased cost of living, increased costs of doing business, the imposition of new and additional taxes, increased advertising costs and other costs over which defendants had no control. Defendants aver that the rates above quoted were construed as maximum rates and that in a substantial number of instances the rates finally charged were less than those above quoted.

25. Defendants admit the allegations of this paragraph except insofar as it alleges that the schedule of commissions adopted by the Washington Board in or about 1931 "fixed" rates of commissions for leasing business or residential properties. Defendants aver that the said schedule was a schedule of standard commissions established by custom, practice and usage and merely published by the Washington Board to its members and interested parties and was a schedule of reasonable rates, recommended as fair compensation in the public interest. Defendants aver that the rates above quoted were construed as maximum rates and that in a substantial number of instances the rates finally charged were less than those above quoted.

26. Defendants admit the allegations of this paragraph except insofar as the allegations that the schedule of commissions now in effect "fixes" rates of commission for leasing the said property. Defendants aver that the said schedule was a schedule of standard commissions established by custom, practice and usage and merely published by the Washington Board to its members and interested parties and was a schedule of reasonable rates, recommended as fair compensation in the public interest. Defendants aver that the rates above quoted were construed as maximum rates and that in a substantial number of

instances the rates finally charged were less than those above quoted.

27. Defendants admit the allegations of this paragraph except insofar as it alleges that a schedule of commissions covering collection of rents and management of commercial and residential properties "fixes" the 1283 rate of commission for such service. Defendants aver that the said rate was established by custom, practice and usage and merely published by the Washington Board to its members and interested parties and was a schedule of reasonable rates recommended as fair compensation in the public interest. Defendants aver the rates above quoted were construed as maximum rates and that in a substantial number of instances the rates finally charged were less than those above quoted.

28. Defendants are advised that the allegations of this paragraph being conclusions of law, they are not required to make answer thereto. Insofar as the allegations of this paragraph purport to be other than conclusions of law, they are denied.

THIRD DEFENSE

Defendants deny that the action of a person, acting as a principal, in buying, selling, leasing, exchanging or securing the management of real property and improvements thereon in the District of Columbia or any of the acts alleged in the Complaint herein constitutes trade or commerce in the District of Columbia or between the District of Columbia and the several states.

FOURTH DEFENSE

Defendants deny that the acts of defendants in securing for principals by professional services, in a position of trust and confidence, the purchase, sale, lease or exchange of real estate or in the management thereof or in contracting to do any of the foregoing or any of the acts alleged in the Complaint constitutes trade or commerce in the District of Columbia or between the District of Columbia and any of the several states.

FIFTH DEFENSE

Defendants' publication of a schedule of standard commissions, as recommended fair compensation in the public interest, constituted a reasonable action designed to prevent practices detrimental both to the public and to its members.

Sixth Defense

The offer of realtors to make contracts to perform personal services in accordance with a standard rate of commissions does not constitute illegal price fixing within the meaning of the law.

Seventh Defense

The acts charged against defendants do not constitute an unreasonable or any restraint of trade or commerce within the meaning of the Sherman Act as amended.

Defendants aver that no acts of defendants alleged herein could constitute a restraint upon a principal in buying, selling, exchanging, leasing or operating for profit, real estate in the District of Columbia.

Eighth Defense

Defendants aver that the business of representing principals in the purchase, sale, exchange, lease or management of real estate in the District of Columbia is highly competitive; that defendants do not and cannot control a substantial portion of the said business and that the
1284 alleged "fixing" of a schedule of standard commissions does not constitute illegal "price fixing" or other illegal restraint within the meaning of the law or a conspiracy directed thereto.

Ninth Defense

Members of the Washington Board and the National Association are Realtors, who possess special knowledge and capacity to render services in their field. The rates set forth in the schedule of standard rates constitute an offer to clients to perform professional services at the standard rates specified, which clients are free to accept or reject as they see fit, in which latter event the services of other capable persons, not members of defendant organizations, are freely available. The defendants have no capacity, actual or potential, or intention to achieve a monopoly or eliminate competition.

Tenth Defense

The schedule of standard rates at any time set forth by the Washington Board constituted and was construed as a schedule of maximum rates and that in a substantial number of instances the rates finally charged were less than those set forth. The action of the Washington Board in so publishing a schedule of standard rates, where no present

capacity or potentiality or intention exists to achieve a monopoly or eliminate competition does not constitute restraint of trade or commerce within the meaning of the Sherman Act as amended.

ELEVENTH DEFENSE

Section 3 of the Code of Ethics of the Washington Board if construed to require maintenance of rates, as charged in the Complaint, has been repealed by dis-user.

TWELFTH DEFENSE

The members of the Washington Board constitute a small proportion of the licensed real estate brokers of the District of Columbia and no acts of the said members can constitute a conspiracy to restrain or a restraint upon trade or commerce.

THIRTEENTH DEFENSE

Defendants deny that the schedule of standard commissions of the Washington Board "fixed" the commissions of members thereof. Defendants aver that the original schedule was theretofore established by custom, practice and usage; that amendments thereof and the so-called new schedule resulted from the increased cost of living, increased costs of doing business, the imposition of new and additional taxes, increased advertising costs and other costs over which defendants had no control. Defendants aver the schedule sets forth reasonable rates and was merely published to members and interested parties by the Washington Board, as recommended fair compensation in the public interest. Defendants aver that rates quoted were construed as maximum rates and that in a substantial number of instances the rates charged were less than those set forth.

FOURTEENTH DEFENSE

Defendants aver that the schedule of commissions published by the Washington Board constituted a schedule of "standard" commissions which contemplated observance or non-observance depending upon the desire of the parties concerned as circumstances might suggest, were non-mandatory in character and have always been construed as such.

1285 FIFTEENTH DEFENSE

Defendants deny that the Constitution, By-Laws and Code of Ethics of the Washington Board or National Board required defendants to maintain rates and commis-

sions adopted by the Washington Board and aver that the sole agreement of members is contained in Section 3 of the Code of Ethics of the Washington Board reading as follows:

"Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates."

Defendants aver that the above-quoted provision was advisory and not mandatory in character and was so construed by the Washington Board and the members thereof and that no penalty for violation thereof was prescribed or enforced.

Sixteenth Defense

Defendants deny that the Constitution, By-Laws and Code of Ethics of the National Association required defendants to maintain rates and commissions adopted by the National Association and aver that the sole agreement of members is contained in Article 9 of the Code of Ethics of the National Association of Real Estate Boards reading as follows:

"The schedules of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor."

Defendants aver that the above-quoted provision was advisory and not mandatory in character and was so construed by the National Association and the members thereof and that no penalty for violation thereof was prescribed or enforced.

Seventeenth Defense

The actions of defendants in representing principals in the purchase, sale, exchange, lease and management of real estate constitutes a rendition of personal services, professional in character and limited to the particular transaction and does not constitute trade or commerce in the District of Columbia or between the District of Columbia and any of the several States.

Eighteenth Defense

Defendants aver that the Congress by legislation specifically applicable to the District of Columbia, the Real Estate Brokers and Business Chance Brokers License Law for the District of Columbia has established a comprehensive plan for the regulation of real estate brokerage in the District of Columbia. The said law establishes a real estate com-

mission of the District of Columbia with power to issue licenses to real estate brokers permitting them to act as such in the said District and with power to revoke their said licenses for misconduct specifically set forth in the said Act. Defendants aver that the Congress by the said Act as enforced ratified and confirmed the schedule of standard commissions in the District of Columbia theretofore established by custom, practice and usage and published and recommended by the Washington Board as fair compensation in the public interest.

1286 NINETEENTH DEFENSE

Defendants aver that plaintiff should not be permitted to maintain its present suit. Defendants aver that a construction of Section 4 of the Sherman Act as amended (15 U. S. C., Sec. 4) which purports to permit the maintenance of a suit to enjoin defendants from doing acts of which plaintiff had knowledge for a long period of time and which the legislative and executive branches of the Government over such long period have acquiesced in and permitted to become customs, practice and usage, constitutes a deprivation of defendants' property without due process of law in violation of the Fifth Amendment of the Constitution of the United States and in violation of the public interest.

WHEREFORE defendants pray that the Complaint herein be dismissed with costs.

WILLIAM E. LEAHY
William E. Leahy

WM. J. HUGHES, JR.
Wm. J. Hughes, Jr.
821 15th Street, N. W.
Washington, D. C.
Attorneys for defendants other than National Association of Real Estate Boards, Herbert V. Nelson and J. Hawley Smith

This is to certify that I have this day, December 1, 1947, served the plaintiff herein, the United States of America, by depositing in the mail, first class, a copy of this Answer, addressed to Victor Kramer, Esq. Anti-Trust Division of the Department of Justice, Washington, D. C.

WILLIAM E. LEAHY
William E. Leahy

1288 In the District Court of the United States
For the District of Columbia
Civil Action No. 3472-47
(Title Omitted)
(File Endorsement Omitted)

Motion for Judgment on the Pleadings—Filed Jan. 3, 1948

The United States of America, plaintiff, by its attorneys, acting pursuant to Rule 12(c) of the Federal Rules of Civil Procedure moves this Court to enter judgment on the pleadings in favor of the plaintiff on the ground that the plaintiff is entitled to judgment as a matter of law on the undisputed facts and defendants' admissions stated in the pleadings.

Dated: January 3, 1948.

JOHN F. SONNETT
John F. Sonnett
Assistant Attorney General

JOHN FORD BAECHER
John Ford Baecher
Special Assistant to the Attorney General

VICTOR H. KRAMER
Victor H. Kramer

HERBERT N. MALETZ
Herbert N. Maletz
Special Assistants to the Attorney General

JOSEPH W. STANLEY
Joseph W. Stanley
Special Attorney

1289 In the District Court of the United States
For the District of Columbia
Civil Action No. 3472-47
(Title Omitted)
(File Endorsement Omitted)

Memorandum of Defendant's National Association of Real Estate Boards and Herbert U. Nelson in Opposition to Motion for Judgment on the Pleadings—Filed Jan. 19, 1948

This is a civil action under the Sherman Anti-Trust law, seeking an injunction and other relief, because of an alleged combination or conspiracy in restraint of trade or commerce. Answers have been filed by the several defendants. Plaintiff has moved for judgment on the pleadings under Rule 12 (c) of the Federal Rules of Civil Procedure. Such

a motion is equivalent to a demurrer to the answers or a hearing on bill and answer, under the prevailing practice prior to the present rules. It is narrower in scope than a motion for summary judgment, which would permit the filing of affidavits and the consideration of documentary matters not actually a part of the pleadings. The obvious purpose of the Government in making a motion in this restricted form is to prevent the parties from submitting affidavits or any additional form of justification, and to confine the discussion to a very limited part of the complaint and answers.

1290 1. THE GOVERNMENT'S MOTION WITH RESPECT TO THE NATIONAL ASSOCIATION RESTS ENTIRELY UPON THE ALLEGATIONS AND ANSWERS TO PARAGRAPH 16.

Under the heading of "Summary of Undisputed Facts" the Government has apparently set forth the facts upon which it relies as a basis for its motion. These facts are set forth in five subheadings. Only in connection with the first subheading is reference made to the answer of the National Association. There reference is made to paragraph 16 of the complaint and answer, which are as follows:

COMPLAINT:

"16. Members of the Washington Board agree as a condition of membership in the National Association to abide by the Code of Ethics of the National Association. Article 9 of this Code requires each member of each local real estate board, including the Washington Board, to observe the schedule of commissions established by the local board of which each is a member."

ANSWER:

"16. Answering Paragraph 16, these Defendants admit that as a condition of membership in the National Association the members of the Washington Board agree to abide by the Code of Ethics of the National Association. These Defendants admit that the Code of Ethics of the National Association, Part I, Article 9, reads as follows: 'The schedule of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every realtor.' These Defendants deny that the aforesaid Article 9 requires each member of the local real estate boards to observe the schedule of commissions established by such boards throughout the United States."

The Government contends that the above provision constitutes a price-fixing agreement. This contention is made in spite of the fact that the answer of the National Association shows very clearly that it had no knowledge of the schedule of fees of the Washington Real Estate Board or of any other specific real estate board. This provi-
1291 sion in the Code of Ethics was merely expressive of the view and opinion of the National Association and nothing more. It was not an agreement or plan or conspiracy of any sort. The National Association never claimed that this provision gave it any rights with respect to the observation of the local schedule of fees, which was regarded as a purely local matter. The provision of the Code of Ethics merely represented the composite opinion of a majority of the local boards as to the effect to be given to the local schedule of fees.

In its memorandum, the Government apparently concedes that the meaning of this provision is not entirely clear. It argues, in effect, that the word "should" really means "shall." There is nothing upon which to base this construction. It is a fundamental rule of the construction of written instruments that a lawyer or a court ought not to express a view as to the meaning of its terms, especially where there is a patent ambiguity, without having the entire instrument before him. This record does not contain the entire Code of Ethics of the National Association and that document is not available for consideration of the Court under the restricted terms of this motion. Furthermore, these defendants have offered to prove the real meaning of this provision, showing its history and contemporaneous interpretation, which are standard guides used in the interpretation of written documents, particularly contracts, but the Government will have nothing of this factual background and seeks to keep the Court from considering same. *The real meaning of this provision in the Code of Ethics can be determined only after full consideration of the entire instrument, its history and background, and its practical operation and interpretation, thus presenting a genuine issue to be determined only after full hearing.*

1292 2. Under This Motion, Admissions Made in the Answers of Other Defendants Are Not Binding on These Defendants.

With respect to the other four subheadings under its Summary of Facts, the Government does not rely upon the answer of the National Association which, in effect, denies

them, but relies upon the answer of the local Washington Board. To support this doctrine the Government cites[1] *Hitchman Coal & C. Co. v. Mitchell*, 245 U. S. 229, 249, 62 L. Ed. 260, 275. That was a complaint for an injunction to restrain efforts of certain members of the United Mine Workers of America to unionize plaintiffs' mines. That case was submitted on the basis of oral and written testimony (*ibid*, p. 234). The question presented to the Supreme Court on this aspect of the case was whether independent evidence of illegality was necessary before the *evidence* of the declarations and conduct of certain defendants were admissible against others. In passing on this objection, the Court said:

> "In order that the declaration and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The *rule of evidence* is commonly applied in criminal cases, but is of general operation; indeed it originated in the law of partnership" (emphasis supplied).

It will thus be seen that the case cited by the Government as authority for its contention with respect to admissions of other defendants as being available against the National Association, arose in connection with the *effect of evidence* and had no relation to pleadings.

1283

The contention of the Government herein goes far beyond the actual effect of the decision, and if it were sustained, would tend to upset the entire basis of pleading and the capacity of a party to make a defense. Parties with secondary or minor interest in a proceeding might well admit, by failing to deny, certain allegations; these defaults have no legal bearing or effect upon the party who makes use of his privilege and denies the truthfulness of certain assertions.

Let us assume a case of two persons being charged with a joint tort, one admitting his liability and the other denying it. Would pleadings in this state raise a genuine issue of fact? Of course, they would. There would be an issue as to the liability of the person making the denial. Even

[1] Also *United States v. General Motor Corp.*, 121 F. 2d 376, 408, which is to the same effect.

if the person admitting liability should take the stand and there admit it, it would be only evidence relating to the issue and would not bind the person denying liability. All of the evidence, including that of the one who admits and that of the one who denies, would have to be submitted to the court or jury for a determination of the issue of fact. Therefore, even as evidence, the admission of one defendant in this proceeding would not be a *conclusive admission* that would absolutely bind the other defendant. He would be entitled to have the issue of fact determined.

3. KNOWLEDGE OF THESE DEFENDANTS OF THE ALLEGED PRICE FIXING IS AN ESSENTIAL PART OF THE CHARGE OF CONSPIRACY.

At several places in its answer such as in paragraph 15, 17 and 18, the National Association has denied the allegations, and has particularly denied that it had any knowledge of the schedule of fees adopted by the Washington Board until the filing of the complaint herein. The charge is that the National Association was a party to a conspiracy
1294 or plan to fix prices. It is an essential part of that charge that the National Association have knowledge that a schedule of fees and charges had been adopted. The existence of such knowledge is an absolute essential in the establishment of the alleged conspiracy or combination. Without it the provision in rule 9 of the Code of Ethics is nothing more than an expression of policy or opinion and does not constitute an agreement or plan of action of any sort.

The denial of knowledge on the part of the National Association of such fees and charges raises a genuine issue of fact which must be established to prove that the National Association is a party to a general plan or conspiracy.

4. THE ANSWER OF DEFENDANT NATIONAL ASSOCIATION RAISES GENUINE[2] ISSUES OF MATERIAL FACTS.

The answer of National Association denies or limits a number of allegations of the complaint which are set forth under the Second Defense. The answer also presents numerous issues of fact in affirmative defenses Third to Twelfth, inclusive. The Government in its motion has ignored all of these issues of fact. Before it can sustain the Government's motion, this Court must find that said

[2] This language taken from Rule 56 provides a more stringent test than is necessary to defeat a motion made under Rule 12 (c).

allegations set forth in the complaint and denied by this defendant; and other allegations set forth in the answer, are totally immaterial, irrelevant or for other reasons do not raise a genuine issue of fact.

1295 Some of the issues of fact thus raised are as follows:

In paragraph 8 it is alleged that members of the Washington Board controlled 50 per cent of the total volume of the dealings in relation to real estate in the District of Columbia. In its answer, the National Association denies this and affirmatively states that "less than 20 per cent of those licensed or engaged in the real estate business in the District of Columbia are members of or affiliated with the Washington Real Estate Board."

In paragraph 9 it is alleged that "due to the transient nature of a large percentage of the population of the District of Columbia" a particular piece of property may be subject to numerous transactions within a short period of time. Defendant National Association denies this allegation and objects to its materiality.

In paragraph 10 it is alleged that "the demand for residential and commercial properties in the District of Columbia is greater than the available supply." This allegation is specifically denied by the National Association, as well as other allegations in said paragraph.

Paragraphs 8, 9 and 10 together apparently were intended to present the Court with a picture of real estate activity in the District of Columbia. Practically all of these allegations are denied. Therefore, under the pleadings, the Court cannot make any findings as to the nature of real estate transactions and business in the District of Columbia. Proper findings of fact by the Court with respect to these issues are necessary for a thorough understanding of the problem involved. It is impossible, upon the record as made by the complaint and answer, to determine these issues. When the Government made these allegations in its complaint, it must have done so because

1296 of the opinion that they were relevant and material to the questions involved. In order to sustain the Governments motion herein, it is necessary for the Court to determine that these allegations and the denials and counter-allegations of the defendants are totally immaterial.

In paragraphs 11, 12 and 13, the Government has charged the existence of a combination and conspiracy to restrain the trade and commerce of the District of Columbia, and each of these allegations has been specifically denied

In paragraph 14 it is charged that the National Association had a Committee on Rates, Rules and Customs whose purpose was to raise brokerage commission rates and achieve uniformity in rates throughout the United States including the District of Columbia. This allegation is specifically denied. In its answer, defendant National Association has set forth in considerable detail its reasons and purposes in making certain studies therein referred to. Upon this motion the matter set forth in the answer of defendant National Association must be taken as admitted. If the purposes of the National Association are those set forth in its answer, then there was no combination or conspiracy to restrain trade. Therefore, this motion must fail.

In paragraph 15 it is alleged that the Washington Board increased the established rates in accordance with recommendations of the National Association. This allegation is specifically denied. Certainly this raises a genuine issue of a material fact which cannot be disposed of in this motion.

In paragraphs 17 to 27 inclusive, numerous allegations are made concerning the Washington Board, its Code
1297 of Ethics and rates of commission established by it.

Defendant National Association has denied knowledge of these matters until after the filing of the complaint. In addition, the defendant National Association has alleged that it had no part in the establishment of any schedules of rates or of any agreement between members of the Washington Board or of any rule adopted by the Board. By these answers there is put in issue the question of the participation of the National Association in the allleged conspiracy. This raises a genuine issue of fact that can be determined only after hearing.

In paragraph 28 the effects of the alleged offenses are set forth by way of allegations of both law and fact. Defendant National Association has denied these allegations. On the basis of the complaint and answer, this Court can make no finding as to the effect of defendant's alleged activities in the District of Columbia.

In the affirmative defenses of the National Association it is denied that the acts of principals or brokers, in connection with transactions concerning real estate in the District of Columbia, constitute trade or commerce in the District or between the District of Columbia and any of the several states. It is further set forth that the acts of defendant National Association have in no respect constituted or resulted in a restraint of trade or commerce and that its

every activity has been designed to improve the standard of conduct of its members, with resulting benefit to the general public. In the Seventh Defense it is alleged that the amount of business controlled by the defendants herein is insubstantial.

In the Eighth Defense, it is affirmatively alleged that realtors in the District of Columbia are especially trained and perform a service in the nature of a profession, which is essentially personal in nature and is not a part of trade or commerce. The function of the National Associa-
1298 tion is to encourage the establishment of high standards in the performance of the duties of the profession and sterling qualities of integrity and faithfulness in carrying out the obligations as trustees for their principals.

In the Tenth Defense it is affirmatively alleged that Article 9 of the Code of Ethics of the National Association was advisory only and was intended to represent the basis of a comparable standard for fees and charges. It is further pointed out that the National Association has never construed this provision as having any binding effect nor does it have any means of enforcing compliance therewith.

In the Twelfth Defense, it is alleged that Congress has by various acts of legislation specifically recognized the lawfulness of the existing schedules of standard commissions which have become established by custom, practice and usage and that defendants herein have done nothing to alter that situation.

In each of these affirmative defenses, it is submitted that genuine issues of fact have been presented, which can be resolved only after full hearing.

5. No Activities of Any of Defendants Constitute Trade or Commerce of the District of Columbia.

Part II, page 7 of plaintiff's memorandum, is devoted to the question whether the alleged activities of defendants constitute trade or commerce within the meaning of Section 3 of the Sherman Act. The logic of the argument presented appears simple but is really ingenuous. It is stated that "Section 3 applies to restraints upon dealings in real estate and upon the real estate brokerage business in the
1299 District of Columbia." To support this conclusion it is argued that Congress has constitutional power to regulate real estate brokerage business and that Congress exercised all the power it possessed in enacting Section 3; therefore, Section 3 covers real estate brokerage business. Undoubtedly, Congress has power to regulate

the real estate brokerage business in certain respects, and has done so by enactment of a comprehensive regulatory statute for the District of Columbia, but it does not follow that such real estate brokerage business is trade or commerce within the meaning of the Sherman Act; rather, the fact that Congress has enacted specific regulation of the business in a special way, would seem to support the conclusion that Congress regarded it in a special category. The same thought can be presented from a different viewpoint. Congress has undoubtedly the power to regulate the practice of law or the practice of medicine in the District of Columbia. It has not done so by special legislation. Many decisions in the law books of long standing would seem to establish that the practice of law is a profession that is not included within the term trade or commerce. The decision of the Supreme Court which will be referred to in more detail hereafter, would seem to establish that the practice of medicine does not constitute trade or commerce. Therefore, it is not true as the Government contends that Congress by the use of the words trade or commerce in the Sherman Act covered every possible activity, including the established professions and similar services. Congress may have enacted legislation that included all the power that it possesses under the category of trade and commerce, but it did not change that which was not trade or commerce, so that it could be included within those terms.

The meaning of trade and commerce has changed throughout the years, but very slowly. Perhaps the
1300 best known example of the fact of change is the illustration of the business of insurance. Under the early decision of *Paul v. Virginia*, 8 Wall. 168, 183, 19 L. Ed. 357, 361, it was held that the business of insurance was not commerce. About 75 years later in *United States v. South-Eastern Underwriters Asso.*, 322 U. S. 533, 88 L. Ed. 1440, a majority of the Supreme Court held that the business of insurance was commerce. The real reason for this change in the decision of the Court was that the business of insurance had grown to such large proportions that its adequate regulation was beyond the power of any individual state. Insurance became commerce because national regulations had become a vital necessity.

No such necessity exists in connection with the professions or the quasi-profession. No such necessity exists to convert the personal services performed by real estate brokers, as agents or principals, into trade or commerce,

which term implies the concept of sale or barter in a market place. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 84 L. Ed. 1311.

On page 8 of the Government's memorandum the decision of *United States v. American Medical Association*, 72 App. D. C. 12, 18, 110 F. 2d 703, is cited as supporting the argument that Section 3 embraces "restraints upon the practice of medicine." In fact, that decision goes further and holds that the practice of medicine constitutes trade or commerce, but the Government undoubtedly recognized the fact that the effect of this decision was materially curtailed by the subsequent decision of the Supreme Court in *American Medical Association v. United States*, 317 U. S. 519, 87 L. Ed. 434.

It will be remembered that the decision cited by the Government, arose on an appeal by the United States from a judgment of the United States District Court sustaining a demurrer to an indictment for violating
1301 Section 3 of the Sherman Act. In the Court of Appeals opinion it is stated that the trial Justice sustained the demurrer on the basis of the following language quoted in *Atlantic Cleaners and Dyers v. United States*, 286 U. S. 427, 436, 76 L. Ed. 1204, 1209, from Mr. Justice Story's opinion in The Nymph, 18 Fed., Cas. No. 10,388, page 506: "Whenever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a *trade*." Upon the basis of certain English decisions there cited, the Court of Appeals held that Section 3 of the Sherman Act applied to "a restraint imposed upon the lawful practice of medicine." (*ibid*, p. 20). It was further held that the allegations of the indictment charged a conspiracy to restrain the operation of hospitals and the financing of medical service for the members of Group Health and that the latter constituted trade or commerce.

The action of the Supreme Court in denying certiorari in this case, 310 U. S. 644, cited by the Government, is of little significance, because it was apparent that the reversal of the judgment below would require a trial and further judgment, the effect of which could be considered later on. Actually just that happened. The subsequent trial resulted in certain convictions which were affirmed by the Court of Appeals in *American Medical Association v. United States*, 76 U. S. App. D. C. 70, 130 F. 2d 233. Certiorari was granted and these convictions were reviewed in

American Medical Association v. United States, 317 U. S. 519, 87 L. Ed. 434. In its decision the Supreme Court said: "We granted certiorari limited to three questions which we thought important: 1. Whether the practice of medicine and the rendering of medical services as described in the indictment are 'trade' under § 3 of the Sherman Act."

With respect to this first point, the opinion is as follows:

"First. Much argument has been addressed to the
1302 question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. In the light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question."

The Court found that the indictment charged a conspiracy to restrain the business of Group Health, and therefore, it was unnecessary to pass upon the question as to whether the practice of medicine constitutes trade, as was found by the Court of Appeals.

We think it clear that the Supreme Court would not have narrowed the ground of its affirmance of the conviction below, if it had not been of the opinion that the practice of medicine was not trade within the meaning of the Sherman Act. It would have been easier to have affirmed on both grounds. Furthermore, the difference in opinion of the District Court and the Court of Appeals could be relegated to the effect of the exception noted in Mr. Justice Story's opinion, quoted in *Atlantic Cleaners and Dyers case, supra*. The action of the Supreme Court can only logically be construed to mean that the exception there indicated is still sound. The practice of the liberal arts or of the learned professions does not constitute trade.

The clear effect of the Supreme Court decision is to render nugatory the excerpt from the opinion of the Court of Appeals quoted in the Government's memorandum.

In the Government's memorandum there is cited *State v. Dixon*, 215 N. C. 161, 164, 1 S. E. 2d 521, 522. The facts in that case are a little involved but when properly understood support the position of defendants. The General Assembly had no power to pass special or local legislation
in the regulation of trade. The Act applied to only
1303 one-third of the counties in the State. The Court construed the constitutional provision as requiring general regulatory statutes to embrace the entire State. The term trade, used in a general sense, was construed as including real estate brokers and salesmen. When it is remembered that the professions have not been regarded as

constituting trade because they are of a higher category, it would naturally follow that a legislature which could not regulate trade, would be powerless to regulate a higher profession. The effect of this decision is merely that of a liberal construction of the constitutional exemption from special legislation. The Government also cites *Finnegan v. Nocrenberg*, 52 Minn. 239, 245, 53 N. W. 1150, 1151, which apparently holds that a cooperative association incorporated under a statute for the purposes of "trade" could lawfully engage in the business of buying and selling of real estate. The case arose in an attempt of creditors to collect from the incorporators, as partners, contending that the corporation was a nullity. The Court pointed out that the statute should be liberally construed.[3]

District of Columbia v. Wardell, 74 App. D. C. 184, 122 F. 2d 202, also cited by the Government, deals with the application of a business privilege tax, which is naturally subject to greatly different rules of construction.

6. *The Government's theory of the case is untenable.*

The complaint in this case seems to be based upon the theory that there was a combination to fix the prices
1304 charged by real estate brokers in the District of Columbia. Certainly, there are no allegations in the complaint in support of a claim of a conspiracy to restrain trade in the buying and selling of real estate. Nevertheless, the memorandum submitted by the Government in support of its motion is based upon both theories but ignores the unfavorable aspects of each theory.

The Government argues that since price fixing is involved, any agreement is unlawful *per se*. But if the issue is that of price fixing, it is really an agreement among those persons who render personal services to the public. It is not the fixing of a price of a commodity to be sold on the market place. Section 6 of the Clayton Act (38 Stat. 731, 15 U. S. C. A. § 17) provides: "The labor of a human being is not a commodity or article of commerce." Charges on

[3] "The purposes for which, under the act, corporations may be formed, are 'of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business.' The main purpose of the act being to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations, for the purpose of giving employment to such capital or labor and skill, the language expressing the purposes for which such corporations may be found ought not to be narrowly construed. Giving a reasonably liberal meaning to the word 'trade' in the act, it would include the buying and selling of real estate * * *."

account of personal services rendered are not subject to the Act. It is true that this section specifically refers to labor organizations, but that is because attempts had been made to apply the Act to labor organizations. Individuals who render services directly to the public have never been regarded as being within the Act, and the Government has cited no case that would support such a claim.

The services rendered by real estate brokers must be one of two things: (1) Personal services of an independent professional nature, which have never been regarded as being a part of commerce or trade; or (2) services rendered to a restricted group or class of society, in which event they would be within the exemption of the Clayton Act, (38 Stat. 730, c. 323, §§ 6 and 20, 15 U. S. C. A. § 17, 29 U. S. C. A. § 52) and the Norris-LaGuardia Act (47 Stat. 70, c. 90, §§4-6, 8 and 13, 29 U. S. C. A. §§ 104-106, 108 and 113). Compare *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 82 L. ed. 1012; *United States v. Hutcheson*, 312 U. S. 219, 85 L. ed. 788. The scope of the latter provision is also discussed under the third topic in the Supreme Court
1305 Opinion in the *American Medical Association case*.

These statutes were found inapplicable in that case because the unlawfulness therein was determined as a combination in restraint of trade, not of the practice of medicine, but of Group Health, that is, a restraint on a third party.

By reason of the limitations of the decision of the Supreme Court in the *American Medical case*, the Government in its argument apparently seeks to come within the terms of that decision by claiming herein that this was an agreement in restraint of trade, namely, an agreement in restraint of the buying and selling of real estate. As previously pointed out, this would seem to be a variance from the complaint itself. Moreover, under such a charge, the reasonableness of the restraint on the buying and selling of real estate is a necessary issue to be considered by the Court. The rule of reason has been an accepted part of the statute for many years. Agreements in restraint of trade are unlawful only if they are unreasonable or undue, and the question of reasonableness is an ultimate conclusion to be determined after consideration of all of the facts. The decisions holding that price fixing is unlawful *per se* are in effect an exception to the rule of reasonableness. If the Government claims that the unlawfulness consists in a combination that restrains the buying and selling of real estate, then the charge of price fixing is unsupported as the com-

mission of real estate brokers is but a small part of the ultimate sale price. The question then is, What is the effect of the alleged agreement concerning brokers' commissions upon the sale of real estate? The answer to such a question involves full consideration of the reasonableness of the alleged restraint.

The Government may contend that the position of these defendants is unsound because of the decision in *Atlantic Cleaners and Dyers v. United States, supra*, and that the present case is substantially similar to that one. That decision is not controlling because of two very im-
1306 portant reasons: (1) In the first place the charges that were fixed and agreed upon by the defendants in that case were the charges in connection with the sale of a commodity, namely, "for cleaning, dying and renovating clothes" and were not purely for services as in the present instance; and (2) "They further agreed to assign and allot to one another the retail dyers and cleaners, who, thereupon, were to be held, respectively, as exclusive customers" *(ibid,* p. 432). Such an agreement was clearly in restraint of trade, regardless of the nature of the services performed.

In passing upon the Government's theory, it is well to consider the result of a favorable decision upon known and established practices. Associations of independent tradesmen of all sorts, such as carpenters, painters, barbers and what not openly meet and decide what they will charge for their services. They openly agree upon a uniform rate, which may or may not be called a union rate, but nevertheless, it is charged to whatever member of the public who seeks to make use of their services. Does the Government claim that such agreements are in violation of the Sherman Act? Can the Government point to a single prosecution of such tradesmen for violating the Act? If not, what is the difference between the agreements of these small tradesmen and the alleged agreement to establish standard commissions for real estate brokers? We earnestly and seriously believe that there is no distinction in law and that any ruling favorable to the Government's case on this motion, would carry with it the necessary result that such agreements of small tradesmen as to the compensation that they charge for their services, would be invalid. There is nothing in the Government's argument that would justify such a drastic broadening of the application of the anti-trust laws.

7. Conclusion

Insofar as the National Association is concerned, the Government's motion for judgment on the pleadings
1307 is based upon a single provision of its Code of Ethics, which, taken out of context, the Government construes as making the National Association a party to a combination or conspiracy to increase schedules of real estate fees and commissions in the District of Columbia. This provision should not be considered by the Court except in connection with the entire Code of Ethics of the National Association and the ends that the Association seeks to achieve.

The Government errs as a matter of law in contending that the issues raised by the answer of the defendant National Association may be ignored because the allegations of the complaint are in part admitted by other defendants. The rule of evidence applicable in conspiracy cases concerning admissions made by co-conspirators does not apply in the construction of pleadings. Moreover, it is an essential part of the Government's complaint to establish that the National Association had knowledge of the alleged price-fixing when it adopted the rule in question.

The answer of the National Association, by denials and affirmative allegations, raises numerous genuine issues of fact which cannot be resolved on this motion.

The cases cited by the Government in support of its contention that the activities of real estate brokers are trade or commerce, fail far short of its claims. The effect of the Supreme Court decision in the *American Medical Association case* is to make it clear that the liberal professions do not constitute trade and the services rendered by a real estate broker are personal and professional in nature and analogous to that of the established liberal professions. Certainly there is nothing in the complaint, admitted by defendant National Association, which indicates that it is a trade and the affirmative averments in this defendant's answer are to the contrary. If there is a question as to whether or not it constitutes trade, such a question can be resolved only after a hearing.

1308 The theory of the Government's case is untenable. While the Government claims that this is a case of price fixing, it is at the most nothing more than the fixing of charges for personal services. To the extent that the Government contends in its argument that the offense

charged is that of restraint of trade in the buying and selling of real estate, then the reasonableness of that restraint is a question that must be fully considered and determined by the Court after full hearing.

For the foregoing reasons, it is respectfully submitted that the motion for judgment on the pleadings should be denied.

Respectfully submitted

ROGER J. WHITEFORD
Roger J. Whiteford

JOHN J. WILSON
John J. Wilson
815 15th Street, N. W.
Washington 5, D. C.
Attorneys for Defendants National Association of Real Estate Boards and Herbert U. Nelson

WHITEFORD, HART, CARMODY & WILSON
of Counsel,

CERTIFICATE OF SERVICE

I certify that I have served the foregoing answer by mailing a copy thereof, postage prepaid, to Hon. Tom C. Clark, Attorney General of the U. S., Department of Justice, Washington, D. C., and Hon. G. Morris Fay, U. S. Attorney, Courthouse, Washington, D. C., attorneys for plaintiff; William E. Leahy, Esq., and William J. Hughes, Jr., Esq., 821—15th St., N. W., Washington, D. C., attorney for defendants other than National Association of Real Estate Boards and Herbert U. Nelson; A. K. Shipe, National Press Building, Washington, D. C., attorney for defendant J. Hawley Smith, this 19th day of January, 1948.

JOHN J. WILSON
John J. Wilson
Attorney for Defendants National Association of Real Estate Boards and Herbert U. Nelson

1310 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Answer to Motion for Judgment on the Pleadings—Filed Jan. 19, 1948

Come now Defendants with the exception of National Association, Herbert U. Nelson and J. Hawley Smith, by their attorneys, and for Answer to the Motion for Judgment on the Pleadings filed herein, say that the same should not be allowed, for the following reasons:

1. The labor of a human being is not a commodity or article of commerce (Clayton Act, Section 6, 15 U.S.C. Sec. 17), and where labor alone is involved and there is no combination with a non-labor group, the Anti-trust Acts are inapplicable.

2. The Government's theory is that defendants have fixed prices for personal services. This amounts to fixing wages which is allowed under the Sherman Act (15 U.S.C. Secs. 1, 3), the Clayton Act, Section 6 (15 U.S.C. Sec.
1311 17), and Section 20 (29 U.S.C. Sec. 52), the Norris-La Guardia Act (29 U.S.C. Secs. 104, 105, 107, 113), and the Taft-Hartley Act (29 U.S.C. Cum. Pamphlet July 1947), Secs. 158, 160 (a) (c) (h). If the Anti-trust Acts are construed to prevent defendants fixing their wages, it constitutes a deprivation of due process of law and the equal protection of the laws as to each defendant.

3. Personal services are outside the scope of the Anti-trust Acts.

4. The defendants are not engaged in trade or commerce within the meaning of the Anti-trust Acts.

5. If the Motion is not overruled as a matter of law, there are genuine issues of material fact which prevent it being granted in respect of:

(a) Defendants' denial of observance of any standard schedule of rates, Paragraph 12.

(b) Defendants' denial of a plan to raise rates, Paragraphs 14, 15.

(c) Defendants' denial that Article 9 of the National Code was mandatory and claim it was only expressive of policy, and was always so construed, Paragraph 16.

(d) Defendants' denial that Rule 3 of the Washing-

ton Code of Ethics was mandatory, and claim it merely set forth standards contemplating observance or non-observance, depending on the will of the parties, and as a basis on which to estimate fair compensation, and that this had always been its construction (Paragraphs 17, 18, Twelfth Defense, Thirteenth Defense).

(e) Defendants' denial that they agreed to and did adhere to the February 16, 1943 standard schedule of commissions, Paragraph 19.

(f) Defendants' claim that the original rates were established by custom, practice and usage, and the
1312 later rates were established by economic pressure (Paragraphs 21, 23, 24, 25, 26, 27, Eleventh Defense).

(g) Defendants' denial that the so-called standard form of sales contract is "generally" used (Paragraph 22).

(h) Defendants' claim that the schedules were published as recommended fair compensation in the public interest (Fifth Defense).

(i) Defendants' claim that the schedule was an offer to perform services, which customers could accept or reject (Eighth Defense).

(j) Defendants' claim that the schedules set forth were maximum rates, with no intent or capacity to achieve a monopoly (Ninth Defense).

(k) Defendants' averment that they constitute only a small proportion of real estate brokers and hence no restraint is possible (Tenth Defense).

WHEREFORE, Defendants move that the Motion be denied.

WILLIAM E. LEAHY
William E. Leahy

WM. J. HUGHES, JR.
Wm. J. Hughes, Jr.
821 15th Street, N. W.
Washington, D. C.
Attorneys for Defendants other than National Association of Real Estate Boards, Herbert U. Nelson and J. Hawley Smith

Acknowledgment of service of this document is hereby made.

VICTOR H. KRAMER
Counsel for Plaintiff

1313 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472–47

(Title Omitted)

(File Endorsement Omitted)

Informal Memorandum—Filed March 1, 1948

The pleadings disclose genuine issues as to material facts which make a trial necessary.

Since the case must be heard upon its merits the court concludes that this is not an opportune time to discuss the law of the case.

Counsel for defendants will submit an order overruling plaintiff's motion for judgment on the pleadings.

F. DICKINSON LETTS
F. Dickinson Letts
Justice

1314 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472–47

(Title Omitted)

(File Endorsement Omitted)

Order Overruling Motion for Judgment on the Pleadings—Filed March 5, 1948

This cause coming on to be heard upon plaintiff's motion for judgment on the pleadings and defendants' opposition thereto, and the Court having heard oral argument and considered briefs, and the Court having determined that there are genuine disputes as to material facts raised by the pleadings, it is this 5th day of March, 1948,

ADJUDGED, ORDERED and DECREED that the said motion be and it is hereby overruled.

F. DICKINSON LETTS
F. Dickinson Letts
Justice

Approved as to form :
Victor H. Kramer
Counsel for Plaintiff

1318 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Answer to Motion for Advancement—Filed June 10, 1948

Comes now the defendant, the National Association of Real Estate Boards, by its attorneys, Roger J. Whiteford, John J. Wilson and Jo V. Morgan, Jr., and files the following opposition to the Motion for Advancement:

I. It is impossible for the National Association of Real Estate Boards to adequately present its defense without the testimony of Herbert U. Nelson, the Executive Vice-President who has been the dominant and controlling officer for approximately twenty-five years. He is now in Europe and will be there for more than two months studying housing conditions. By so doing, he is preparing to make his study and information available to committees and members of Congress and to the building and real estate industry of the United States. This is a public service being performed at the expense of the defendant, the National Association of Real Estate Boards and is entitled to recognition as such even by anti-trust counsel of the Department of Justice.

2. The issues of this case do not "involve important questions of public policy concerning the interpretation and enforcement of the Sherman Anti-Trust Act", as alleged in the affidavit of John F. Baecher, nor can this case "materially affect the program of the Department of Justice for enforcement of the anti-trust laws in the

1319 housing field". Such statements in the light of the facts are a little short of infantile. There are approximately two hundred and fifty brokers in the District of Columbia as members of the Washington Real Estate Board. There are more than three thousand persons licensed in the real estate business in the District of Columbia. Th sole question involved relates to brokerage by these few brokers *in the District of Columbia:* No attempt has been made to apply the anti-trust laws to the real estate business in other sections of the country. It is to be doubted that the most vigorous zealot against the real estate industry would have the temerity to make any such contention. The contention that the decision of the United States District Court for the District of Columbia

in the criminal action against these same defendants may materially affect the Department of Justice in the enforcement of the anti-trust laws in the housing field nationally can be explained only on the ground of a vivid imagination.

3. The Government made a motion for judgment on the pleadings in this cause which was argued on March 1, 1948, before Mr. Justice Letts. The Government's motion was denied on the ground that there were genuine issues of material fact requiring a trial. It may take several weeks of the Court's time to try these issues. If the trial of the criminal case on identically the same issues is to be used as a criterion, it must be said that the Government's case cannot be presented within three trial days.

4. In Paragraph 5 the affiant Baecher alleges that in the past year there were many thousands of real estate transactions in the District of Columbia in which some real estate brokers, members of the Washington Board, participated as brokers and charged fees based upon the alleged combination that it is contended was in violation of Section 3 of the Sherman Anti-Trust Act. Affiant and his co-prosecutors know that the practice complained of has been in operation not only for the past year but for the past quarter of a century. There is no emergency
1320 in the matter. More than that, the aforesaid affiant and his co-prosecutors know that the action of the Washington Board in suspending certain portions of its by-laws has made the whole matter a moot question. The record further discloses that the Department of Justice made an investigation of the files of these defendants in April of 1946 and were fully cognizant of everything that both defendants had done and were doing, yet no suit, either criminal or civil, was filed until the 27th day of August, 1947. If there be such an emergency as to require this defendant to go to trial without its principal witnesses, some explanation would seem to be due from the affiant and his associates in the Anti-Trust Division as to why the suit was not brought sooner.

5. This defendant, the National Association of Real Estate Boards, proposes in the near future to bring to the attention of this Court by proper motion the fact that the issues presented in the present civil case have already been determined adversely to the Government in the criminal case which is almost an exact counterpart as to word and paragraph of this civil case. It is believed that the holding in the criminal case that the acts shown against these

associations did not constitute a violation of the Sherman Act, will bar any further proceeding by the Government in this cause.

WHEREFORE, the defendant, the National Association of Real Estate Boards, prays that the motion for advancement filed herein be denied.

ROGER J. WHITEFORD
Roger J. Whiteford
JOHN J. WILSON
John J. Wilson
JO V. MORGAN, JR.,
Jo V. Morgan, Jr.,
815-15th Street, N. W.,
Attorneys for Defendant National Association of Real Estate Boards

1321 In the District Court of the United States
For the District of Columbia
Civil Action No. 3472-47
(Title Omitted)
(File Endorsement Omitted)

Affidavit in Opposition to Motion for Advancement—Filed June 10, 1948

District of Columbia, ss:

I, Roger J. Whiteford, being first duly sworn, depose and say:

I am one of counsel representing the National Association of Real Estate Boards and represented that Association in the criminal case No. 750-47 brought against these same corporate defendants. In that case I advised Government counsel that Herbert U. Nelson was leaving for Europe on June 7th for an extended study of housing conditions there and would be gone for approximately two months. They knew that he had postponed his leaving for an additional week in order to complete his testimony in the criminal case. He was used as a Government witness in the criminal case and they knew his long and intimate connection with the National Association of Real Estate Boards as its Executive Vice-President. They further know the necessity of his testimony so far as the National Association is concerned and indeed, if their procedure in the equity case is to be the same as it was in the criminal

case, Herbert Nelson's testimony will be necessary in the Government's case. Government counsel further know that this witness will not return until the 20th of August.

Counsel further know that as part of the prepara-
1322 tion for this study Herbert Nelson shipped his automobile to Europe in order that it might be available for his use in this study of the postwar housing development in Europe. All this preparation was made in order that this witness could leave following the criminal trial, everyone knowing that this civil action would not be reached this term of Court. Affiant therefore says that this motion to advance is made in an effort to prevent appropriate defense by the National Association of Real Estate Boards.

ROGER J. WHITEFORD

Subscribed and sworn to before me this 10th day of June, 1948.

MARGARET H. RAEDY
Notary Public, D. C.

(Seal)

1327 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Supplemental Answer of the National Association of Real Estate Boards and Herbert U. Nelson—Filed July 6, 1948

Comes now the National Association of Real Estate Boards and Herbert U. Nelson, by their attorneys, without waiving any of the defenses in the original answer herein filed but supplementing the answer filed on December 1, 1947, and further answering the complaint, allege:

FOR A FIRST SUPPLEMENTAL DEFENSE

1. On August 27, 1947, an indictment was returned in the District Court of the United States for the District of Columbia against the defendants, the National Association of Real Estate Boards and the Washington Real Estate Board, by Criminal No. 950-47. The indictment is incorporated herein by reference and made a part hereof as though the same were fully set forth herein. A copy thereof is attached hereto as Exhibit "A".

2. The defendants named in said indictment plead not guilty to the matters therein charged and subsequent to the filing of the original answers by the defendants herein, the National Association of Real Estate Boards and the Washington Real Estate Board, the said defendants named in said indictment were tried thereon before the District
1328 Court of the United States for the District of Columbia and a jury from May 24, 1948, to June 4, 1948. At the close of the testimony offered by the Government, both defendants moved for judgment of acquittal, the motion of the defendant National Association of Real Estate Boards being attached hereto and made a part hereof by reference and being Exhibit "B". After argument upon said motion the Presiding Justice of the District Court on June the 4th, 1948, granted the motions made by both defendants for a judgment of acquittal in the nature of a demurrer to the evidence. The Court's Opinion in ruling upon the said motion is attached hereto as Exhibit "C" and made a part hereof by reference as fully to the same extent as if fully set forth herein.

3. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the complaint herein. The two corporate defendants are the same in both cases with the addition of one officer, to-wit, Herbert U. Nelson, as Executive Vice President of the defendant National Association of Real Estate Boards, and the officers and directors of the Washington Real Estate Board being added as defendants in the complaint herein. All of the acts and things complained of in the complaint herein are and were the same acts and things complained of in the indictment aforesaid.

4. The adjudication of the District Court of the United States for the District of Columbia and the judgment of acquittal rendered in favor of the defendants National Association of Real Estate Boards and the Washington Real Estate Board in said criminal case, as hereinabove set forth, are *res adjudicata* and said judgment is a bar to the maintenance of this suit.

FOR A SECOND SUPPLEMENTAL DEFENSE

The defendants, the National Association of Real Estate Boards and Herbert U. Nelson, by their attorneys, say that they are informed and believe and therefore allege that on, to-wit, June 22, 1948, the defend-
1329 ant, the Washington Real Estate Board, revoked its schedule of commissions and by laws with respect thereto which

had been suspended on September the 25th, 1947, and by its Board of Directors promulgated a standard or schedule of commissions which were stated to be in the public interest and for its guidance. The said suggested schedules are advisory and in no way obligatory on the members of the Washington Real Estate Board. Further the defendants are advised that on June 22, 1948, the Board of Directors of the Washington Real Estate Board by unanimous resolution rescinded its Code of Ethics and substituted different standards of practice. The said standards of practice contained no provision similar to Article 3 of the Code of Ethics to the effect that the broker should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates. As to Article 9 of the Code of Ethics of the National Association, defendant avers that the said article is not mandatory in character but merely expresses a policy as in practice has always been construed. These defendants therefore say that such action of the Washington Real Estate Board renders the entire contention of the Government in this case moot and therefore there is no just issue for cause of action and the complaint herein should be dismissed.

WHEREFORE, the defendants pray that the complaint herein be dismissed with costs.

ROGER J. WHITEFORD
Roger J. Whiteford

JOHN J. WILSON
John J. Wilson

JO V. MORGAN, JR.
Jo V. Morgan, Jr.
815—15th Street, N. W.
Attorneys for Defendants National Association of Real Estate Boards and Herbert U. Nelson

The filing of this supplemental answer is consented to but without admitting any of the facts pleaded therein.

VICTOR H. KRAMER
HERBERT N. MALETZ
Special Assistants to the Attorney General

1347 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Motion for Summary Judgment Under Rule 56—Filed July 6, 1948

Come now the defendants, the National Association of Real Estate Boards and Herbert U. Nelson, by their counsel, and move for a summary judgment upon the basis of the defenses contained in the supplemental answer filed herein.

ROGER J. WHITEFORD
Roger J. Whiteford

JOHN J. WILSON
John J. Wilson

JO V. MORGAN, JR.
Jo V. Morgan, Jr.
815—15th Street, N. W.
Attorneys for Defendants National Association of Real Estate Boards and Herbert U. Nelson.

I hereby certify that service of the foregoing Motion for Judgment was made by mail the 2d day of July, 1948.

ROGER J. WHITEFORD
Roger J. Whiteford

1348 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Supplemental Answer of Washington Real Estate Board and Individual Defendants Other than Herbert U. Nelson and J. Hawley Smith—Filed July 7, 1948

Come now the Washington Real Estate Board and the individual defendants herein, other than Herbert U. Nelson and J. Hawley Smith, by their attorneys, William E. Leahy and William J. Hughes, Jr., and without waiving

their defenses in their Answer already filed but supplementing their said Answer filed herein December 1, 1947, and further answering the complaint, allege:

FIRST SUPPLEMENTAL DEFENSE

1. On August 27, 1947, an indictment was returned in the District Court of the United States for the District of Columbia against the defendants The National Association of Real Estate Boards and the Washington Real Estate Board by Criminal No. 950-47. The indictment is incorporated herein by reference and made a part hereof as though the same were fully set forth herein. A copy thereof is attached hereto as Exhibit "A".

2. The defendants named in said indictment pleaded not guilty to the matters therein charged and subsequent to the filing of the original answers by the defendants herein, the National Association of Real Estate Boards and the Washington Real Estate Board, the said defend-
1349 ants named in said indictment were tried thereon before the District Court of the United States for the District of Columbia and a jury from May 24, 1948, to June 4, 1948. At the close of the testimony offered by the Government, both defendants moved for judgment of acquittal, the motion of the defendant National Association of Real Estate Boards, adopted by the Washington Board, being attached hereto and made a part hereof by reference and being Exhibit "B". After argument upon said motion the Presiding Justice of the District Court on June the 4th, 1948, granted the motions made by both defendants for a judgment of acquittal in the nature of a demurrer to the evidence. The Court's Opinion in ruling upon the said motion is attached hereto as Exhibit "C" and made a part hereof by reference as fully as if set forth herein.

3. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the complaint herein. The two corporate defendants are the same in both cases with the addition of one officer, to-wit, Herbert U. Nelson, as Executive Vice President of the defendant National Association of Real Estate Boards, and the officers and directors of the Washington Real Estate Board being added as defendants in the complaint herein. All of the acts and things complained of in the complaint herein are and were the same acts and things complained of in the indictment aforesaid.

4. The adjudication of the District Court of the United States for the District of Columbia and the judgment of acquittal rendered in favor of the defendants National Association of Real Estate Boards and the Washington Real Estate Board in said criminal case, as hereinabove set forth, are *res adjudicata* and said judgment is a bar to the maintenance of this suit.

SECOND SUPPLEMENTAL DEFENSE

5. On September 30, 1947, the Washington Real Estate Board at its annual meeting suspended the operation of the Schedule of Standard Commissions and Paragraph 1, 1350 Section 3, of the Code of Ethics until the present litigation was disposed of. On June 22, 1948, a Special Meeting of the membership of the Washington Real Estate Board, after due notice in accordance with its constitution and by-laws, was called for the purpose of amending and revising the constitution and by-laws as outlined in a notice to the members dated June 9, 1948. At the said annual meeting the members of the Board, a quorum being present, voted unanimously to rescind Article 14 of the constitution and by-laws, reading as follows:

"RULES

> The Board by majority vote at any regular or special meeting may adopt specific rules of practice or ethics and any such rules when adopted automatically become part of these By-Laws and are binding alike on every member; provided, however, that every member shall be mailed a written notice at least ten days before the meeting, which notice shall contain the complete substance of the proposed rule."

and to substitute therefor the following:

"STANDARDS OF PRACTICE

> The Board of Directors may from time to time promulgate and publish such standards of practice, recommended forms of leases, contracts of sale, and any other pertinent information or data for the benefit and information of the public and the guidance of members."

6. Pursuant to the authority vested in the Board of Directors by the said Article 14 as thus revised, the Board of Directors at a meeting on June 23, 1948, by unanimous resolution rescinded the Code of Ethics of the Board adopted September 14, 1922, and amended December 12, 1934,

and substituted therefor Standards of Practice. A copy of the Minutes of the meeting of the Board of Directors of June 23, 1948, is attached hereto and made a part hereof as Exhibit "D".

7. Likewise, at the said meeting of the Board of Directors of June 23, 1948, the said Board acting under the authority of Article 14 of the Constitution and By-Laws, as revised at a meeting of the members June 22, 1948, rescinded the Schedule of Standard Commissions in its entirety and adopted a new Schedule of Standard Commissions which is contained in Exhibit "D" attached hereto and made a part hereof. The said "Standards of Practice" and "Schedule of Standard Commissions" are in process of being printed for distribution to members and the public.

1351 8. Defendants aver that by the said actions above recited the provisions of the Code of Ethics, in particular Paragraph 1 of Section 3 thereof, complained of by plaintiff, are no longer in existence. Furaher, defendants aver that the Schedule of Standard Commissions adopted by the Board of Directors at its meeting June 23, 1948, in no way constitutes rate fixing, as alleged in the complaint herein.

9. As to the allegations of Paragraphs 12 and 16 of the complaint herein relative to the alleged requirement of Article 9 of the Code of Ethics of the National Association that defendants observe the Schedule of Fees established by the local real estate boards, defendants aver that Article 9 is not mandatory in character but merely expressive of policy and in practice has always been so construed. Defendants also aver that the said Schedule, contained in Exhibit "D" herein, shows on its face that it is non-mandatory in character, merely expressive of custom, practice and usage, and published for the guidance and protection of members and the public to prevent unethical practices. The said Schedule further shows that the Board has no intention or purpose in publishing it, directly or indirectly, to require any member to adhere to this Schedule as a fixed schedule or even to suggest such adherence, and that no member is bound to its observance by any provision of any code of ethics or any requirement of either the Washington Board or the National Association of Real Estate Boards. Further, the defendants aver that the commission which a broker is to receive in any transaction is a matter of his individual negotiation with his principal for whom he is

acting, in each individual case, and that the said Schedule merely sets forth a basis on which to estimate fair compensation in the public interest.

WHEREFORE, by reason of the foregoing, defendants aver that the present case is moot, that no case or con-
1352 troversy is now pending in this court, and that the prayers of the complaint herein cannot be granted, and the complaint herein should be dismissed.

Respectfully submitted,

WILLIAM E. LEAHY
WM. J. HUGHES, JR.
William E. Leahy
William J. Hughes, Jr.
821 15th St., N. W.
Washington, D. C.
Attorneys for Washington Real Estate Board and individual defendants other than Herbert U. Nelson and J. Hawley Smith.

Duly sworn to by Charles J. Rush.
Jurat omitted in printing. (All in italics)

1380 In the District Court of the United States
For the District of Columbia

Civil Division

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Order

The above-entitled cause having come before this court June 16, 1948 for hearing upon Plaintiff's Motion for Advancement, and counsel for all parties having filed memoranda and been heard orally,

IT IS ORDERED, this 7th day of July, 1948, the Plaintiff's Motion for Advancement be, and is hereby, overruled and denied, without prejudice to renewal at a later date.

T. ALAN GOLDSBOROUGH
Justice

1381 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Motion for Summary Judgment under Rule 56—Filed July 7, 1948

Come now defendant Washington Real Estate Board and the individual defendants herein, other than Herbert U. Nelson and J. Hawley Smith, by their attorneys, William E. Leahy and William J. Hughes, Jr., and move for a summary judgment under Rule 56, Rules of Civil Procedure, upon the defenses shown by the Supplemental Answer filed herein.

WILLIAM E. LEAHY
WM. J. HUGHES, JR.
William E. Leahy
William J. Hughes, Jr.
821 15th St., N.W.
Attorneys for Washington Real Estate Board and individual defendants other than Herbert U. Nelson and J. Hawley Smith

Service of the above motion was made by mailing copy of the same, postage prepaid, this 5th day of July, 1948.

WILLIAM E. LEAHY
William E. Leahy

1402 In the District Court of the United States
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Order Denying Motions for Summary Judgment—Filed July 16, 1948

On motions made by all defendants under Rule 56, Rules of Civil Procedure, for summary judgment in favor of the defendants to dismiss the complaint upon the defenses shown by the supplemental answers filed herein, and after hearing on said motions, it is hereby

ORDERED, ADJUDGED, AND AGREED that said motions for summary judgment be and the same hereby are denied.

T. ALAN GOLDSBOROUGH
Justice

Dated: July 16th, 1948.

Defendants have no objection
to the form of this order.

WM. E. LEAHY
WM. J. HUGHES, JR.
Attorneys for Washington Real Estate Board and individual defendants other than Herbert U. Nelson and J. Hawley Smith

JO V. MORGAN, JR.
JOHN J. WILSON
Attorneys for National Association of Real Estate Boards and Herbert U. Nelson

A. K. SHIPE
Attorney for J. Hawley Smith

1422 The United States of America, ss.

Mandate

(Seal)

The President of the United States of America
To the Honorable the Judges of the United States District Court for the District of Columbia,

GREETING:

WHEREAS, lately in the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, before you or some of you, in a cause between the United States of America, plaintiff, and the National Association of Real Estate Boards, *et al.*, defendants, Civil No. 3472-47, wherein the order of the said District Court entered in said cause on the 16th day of July, 1949, is in the following words, viz:

"On motions made by all defendants under Rule 56, Rules of Civil Procedure, for summary judgment in favor of the defendants to dismiss the complaint upon the defenses shown by the supplemental answers filed herein, and after hearing on said motions, it is hereby

ORDERED, ADJUDGED, and DECREED that said motions for summary judgments be and the same hereby are denied.

"T. ALAN GOLDSBOROUGH
Justice"

1423 as by the inspection of the transcript of the record by the said District Court, which was brought into the United States Court of Appeals for the District of Columbia Circuit by virtue of allowance of a special appeal, agreeably to the act of Congress in such case made and provided fully and at large appears;

1424 And Whereas, in the term of April , in the year of our Lord one thousand nine hundred and forty-nine, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this court that this appeal be, and it is hereby, dismissed.

June 13, 1949.

1425 You, Therefore, Are Hereby Commanded that such such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said special appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the twenty-first day of June, in the year of our Lord one thousand nine hundred and forty-nine.

Joseph W. Stewart
Clerk of the United States Court of Appeals
for the District of Columbia Circuit

By: C. Preston Gainor
Assistant Clerk

No. 9956

United States Court of Appeals for the District of Columbia Circuit

April Term, 1949

National Association of Real Estate Boards
appellants
vs.
United States of America,
appellee

Mandate

1426 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Stipulation re submission of cause—Filed June 22, 1949

IT IS MUTUALLY AGREED AND STIPULATED by and between all parties hereto, through their attorneys, that when the above-entitled cause is called for trial it will be submitted to the Court on the entire record made in UNITED STATES OF AMERICA vs. NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, *et al.*, Criminal Action No. 950-47, which complete record is incorporated herein by reference.

IT IS FURTHER AGREED AND STIPULATED that the plaintiff may reoffer at the trial of the civil action those exhibits which were offered at the trial of the criminal and were excluded and if they are admitted at the trial of the civil suit then the defendants shall have the privilege of offering such evidence as they may deem advisable for the purpose of answering or rebutting the exhibits.

Dated this 22nd day of June, 1949.

ROGER J. WHITEFORD
Attorney for Defendant National Association of Real Estate Boards and Herbert U. Nelson

VICTOR H. KRAMER
Attorney for the United States

WALTER M. BASTIAN
Attorney for J. Hawley Smith

1427 WILLIAM E. LEAHY
Attorneys for Defendants Other Than National Association of Real Estate Boards, Herbert U. Nelson and J. Hawley Smith

1429 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Plaintiff's Proposed Finding of Fact—Filed July 27, 1949

1. The defendant Washington Real Estate Board is a District of Columbia corporation, incorporated in 1928. It

is a successor to an unincorporated association of real estate brokers organized in 1913 [same as defendants'].

2. Its membership is composed of 250 real estate brokers out of a total of 1774 (G. Ex. 53) brokers operating in the District of Columbia and its members have performed a substantial portion of the total business done in the District of Columbia in real estate brokerage transactions [same as defendants' except for figure 1774].

3. Some of the real estate brokers firms which are members of the Washington Real Estate Board are incorporated [same as defendants'].

4. Except for the defendant Herbert U. Nelson, each of the individuals specifically named as a defendant in this class action has been a member of the Board of Directors of the Washington Real Estate Board and is associated with a real estate brokerage firm that is a member of the Washington Real Estate Board [same as defendants'].

5. Each of the individual defendants other than Herbert U. Nelson and all defendants named herein as a class were parties to the agreements found herein (G. Exs. 9, 10, 11, 20; T. 104-6).

1430 6. The Washington Board has for many years prescribed fixed rates of commissions to be paid to brokers on sales of real property. The rates are published and are readily available to the public (Opinion, p. 3).

7. Members of the Board are urged to use this Schedule of Standard Commissions and, in practice, both members and many non-members employ it (Opinion, ~~p. 3~~) [same as defendants'].

8. There is nothing clandestine or surreptitious about this activity of the Washington Board [same as defendants'].

9. All applicants for membership in the Washington Real Estate Board are required to fill out and sign an application form which states thereon that such applicant agrees to subscribe to the Constitution and By-Laws, Code of Ethics and other rules of the Washington Real Estate Board [same as defendants'].

10. On February 16, 1943, the Washington Board changed its Schedule of Standard Commissions resulting in higher charges in many instances and in lower commissions in other situations [same as defendants'].

11. In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board (Opinion, p. 3).

12. The Constitution and By-Laws of the Washington Real Estate Board provide that rules of practices or ethics,

when adopted, become part of the By-Laws and are binding on every member (G. Ex. 3, T. 88).

13. All members of the Washington Real Estate Board must agree as a condition of membership to abide by the Code of Ethics of the Board (Compl. par. 18, Ans. Wash. Bd. par. 18; G. Exs. 3, 5).

14. According to the rules of the Washington Real
1431 Estate Board it was not ethical or proper for its members in normal cases to solicit business at rates lower than those established by the Board (T. 172-3).

15. Section 3 of the Code of Ethics of the Washington Real Estate Board provides: "Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates" [same as defendants'].

16. Washington Real Estate Board prepared for its members a standard form real estate sales contract used by some of the members which provided that the seller agree to pay to agent the "rate of commission fixed by the Washington Real Estate Board" (Compl. par. 22; Ans. Wash. Bd. par. 22; T. 174-78; G. Ex. 26; T. 512-13; 549-50).

17. The defendant National Association of Real Estate Boards is a nationwide, incorporated, trade association of which the Washington Real Estate Board is a member. Active members of the Washington Real Estate Board are likewise members of the National Association.

18. Defendant Herbert U. Nelson is the Executive Vice-President of the National Association of Real Estate Boards and as such furthered the activities of the Committee on Rates, Rules and Customs of said Association (G. Exs. 29-38, 40, 42, 43).

19. Every active member of the National Association pledges himself to observe its Code of Ethics and to conduct his business in accordance with said Code of Ethics (G. Exs. 6, 8, 9, 10).

20. Article 9 of the Code of Ethics of the National Association of Real Estate Boards states: "The schedules of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor" (G. Ex. 6).

21. Article 35 of the Code of Ethics of the National
1432 Association of Real Estate Boards states: "No instructions nor inducements from any client or customer relieve the Realtor from his responsibility strictly to observe this Code of Ethics" (G. Ex. 6).

22. As a condition of membership in the National Association of Real Estate Boards, each of the members of the

Washington Real Estate Board agrees to abide by the Code of Ethics of the National Association of Real Estate Boards (Compl. par. 16, Ans. Wash. Ed. par. 16, Ans. Natl. Assn. par. 16).

23. The By-Laws of the National Association of Real Estate Boards require each member board to adopt the Code of Ethics of the Association as a part of its rules and regulations, for violation of which disciplinary action may be taken by the Association (G. Ex. 7, p. 22).

24. The By-Laws of the National Association of Real Estate Boards provide that any member board which shall neglect or refuse to maintain the Code of Ethics of the Association with respect to the business activities of its constituent members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership in the Association (G. Ex. 7, p. 22).

25. For a number of years beginning about 1936 and continuing to about 1946, the National Association of Real Estate Boards had a Committee on Rates, Rules and Customs (T. 46, 328, 329; G. Ex. 31, p. 6).

26. The purpose of the Committee on Rates, Rules and Customs was to make studies of real estate brokerage commission rates prevailing throughout the United States including the District of Columbia (Compl. par. 14, Ans. Natl. Assn. par. 14; G. Ex. 30; T. 46) to see if there could be developed something in the way of a national schedule with proper provisions for regional and local variations (G. Ex. 30). This Committee was empowered to report the results of its studies to member boards (T. 468).

1433 27. On February 10 and May 10, 1939, the Commission Study Committee of the Washington Board held meetings to discuss changes in the schedule of commissions of the Board, at which meetings it was decided to take no action in connection with revising the schedule of commission rates until such time as the Board would be in receipt of the recommendations of the Committee on Rates, Rules and Customs of the National Association of Real Estate Boards (G. Exs. 12, 27; T. 108-13, 181-84).

28. On June 16, 1941, the Chairman of the Committee on Rates, Rules and Customs of the National Association of Real Estate Boards sent a "Guide" on commission rates to the Executive Secretary of the Washington Real Estate Board, which "Guide" contained suggested rates to be charged for the sale, exchange, lease and management of real estate (G. Exs. 17, 17-A; T. 129-33).

29. Said "Guide" recommended that the rate of commission for brokers acting as agents in the sale of real

estate should be 5% on the first $100,000 of the purchase price and 3% on any excess above $100,000 (G. Ex. 17-A).

30. During 1942, as the result of the activities of the Committee on Rates, Rules and Customs, many member boards made complete studies of their existing schedules with a view toward changing them to conform as nearly as possible with the suggested national guide (G. Ex. 43, p. 7; T. 358-9).

31. On January 20, 1943, the Board of Directors of the Washington Real Estate Board adopted a recommendation of its Brokers Committee establishing the rate of commission for its members when acting as agents in the sale of real estate in the District of Columbia and the adjacent metropolitan area at 5% of the first $50,000 of the sales price of the property and 3% on the amount in excess thereof (G. Ex. 18; T. 139-41).

VICTOR H. KRAMER
Victor H. Kramer
Trial Attorney

1434 CERTIFICATE OF SERVICE

I certify that I have served the foregoing Plaintiff's Proposed Findings of Fact on each of the defendants by causing a copy to be delivered to the person in charge at the office of each of their respective attorneys, as follows:

Roger J. Whiteford and John J. Wilson
815-15th Street, N. W.
Washington, D. C.
Attorneys for the defendants National Association of Real Estate Boards and Herbert U. Nelson

William E. Leahy and William J. Hughes
821-15th Street, N. W.
Washington, D. C.
Attorneys for the defendants Washington Real Estate Board and individual defendants other than Herbert U. Nelson and J. Hawley Smith

Walter M. Bastian and A. K. Shipe, Jr.
National Press Building
Washington, D. C.
Attorneys for defendant J. Hawley Smith

July 27, 1949

C. HEYWARD BELSER
C. Heyward Belser
Attorney for Plaintiff

1435 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Findings of Fact—Filed July 29, 1949

1. The defendant Washington Real Estate Board is a District of Columbia corporation, incorporated in 1928. It is a successor to an unincorporated association of real estate brokers organized in 1913.

2. Its membership is composed of 250 real estate brokers out of a total number of about 2000 brokers operating in the District of Columbia and its members have performed a substantial portion of the total business done in the District of Columbia in real estate brokerage transactions.

3. Some of the real estate brokers firms which are members of the Washington Real Estate Board are incorporated.

4. Except for the defendant Herbert U. Nelson, each of the individuals specifically named as a defendant in this class action has been a member of the Board of Directors of the Washington Real Estate Board and is associated with a real estate brokerage firm that is a member of the Washington Real Estate Board.

5. Members of the Washington Real Estate Board perform personal services in the sale, lease and exchange of real estate.

6. The Washington Real Estate Board has for many years published a "Schedule of Standard Commissions," for such services, which is readily available to the public.

7. Members of the Board are urged to use this
1436 schedule of standard commissions and, in practice, both members and many non-members employ it.

8. There is nothing clandestine or surreptitious about this activity of the Washington Board.

9. All applicants for membership in the Washington Real Estate Board are required to fill out and sign an application form which states thereon that such applicant agrees to subscribe to the Constitution and By Laws, Code of Ethics and other rules of the Washington Real Estate Board.

10. On February 16, 1943, the Washington Board changed its Schedule of Standard Commissions resulting in higher

charges in many instances and lower commissions in other situations.

11. In actual practice, the published rates of commission are used in a great majority of transactions, although in many cases members of the Washington Board depart from the Schedule.

12. In exceptional situations a lower charge is made than that published by the Board.

13. There is no proof that the standard rate of commissions published by the Washington Real Estate Board is unreasonable or that this activity unduly or unreasonably restrains competition between brokers or adversely affects the sale of real estate.

14. Before the board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive charges, and one of the purposes of the Board was to eliminate this undesirable condition.

15. Section 3 of the Code of Ethics of the Washington Real Estate Board provides: "Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates".

16. The said schedules of standard commissions have been construed by the members as non-mandatory in
1437 character, and as setting forth a basis upon which to estimate fair compensation for services performed.

17. The Standard Form of real estate contract prepared by the Washington Real Estate Board and used by some of its members consists of an offer by the agent to render personal services to the principal at the rate of commissions published in the Standard Schedule of Commissions of the Washington Board. Use of such standard form is optional with the member and his principal.

18. The defendant National Association of Real Estate Boards is a nation wide, incorporated, trade association of which the Washington Real Estate Board is a member. Active members of the Washington Real Estate Board are likewise members of the National Association.

19. Defendant Herbert U. Nelson is the Executive Vice President of the National Association of Real Estate Boards.

20. Neither the defendant National Association of Real Estate Boards nor the defendant Herbert U. Nelson conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia.

21. On the same day the instant complaint was filed, an indictment was found against defendants National Association of Real Estate Boards and Washington Real Estate Board, in Criminal No. 950-47 in this Court.

22. The said indictment purported to allege a conspiracy in restraint of trade and was substantially similar, paragraph by paragraph, to the allegations of the complaint herein.

23. The parties to this action are the same as the parties in Criminal No. 950-47, or are in privity with such parties.

24. At the trial of Criminal No. 950-47, counsel for defendants National Association of Real Estate Boards and Washington Real Estate Board filed a motion for a judgment of acquittal. On June 4, 1948, the trial court granted that motion and entered a final judgment of acquittal.

25. The defendants herein prior to the trial of this case, filed on July 6, 7, 1948, a supplemental answer, set-
1438 ting forth the identity of the indictment with the complaint herein, the motion for a judgment of acquittal and the grounds therein, and alleged that the final judgment of the District Court entering a judgment of acquittal rendered this case *res judicata*.

26. Defendants asserted the said defense of *res judicata* in a motion for summary judgment filed in the present case, which motion the court (Mr. Justice Goldsborough) overruled.

27. During the trial herein on the merits defendants asserted the defense of *res judicata* based on the record in Criminal No. 950-47.

Conclusions of Law

1. The action of real estate brokers in publishing a standard rate of commissions charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act, in the absence of a showing that such rates were unreasonable or oppressive in themselves or that they result in a substantial diminution of competition or otherwise create an unreasonable restraint of trade or commerce. There is no such showing or such a contention in this case.

2. The labor of a human being is not a commodity or article of commerce. To contract for one's personal services is a fundamental right of every man. For man to combine to regulate the compensation to be charged by them for their own services is entirely legal.

3. The acts proved do not constitute violations of the Sherman Act.

4. The defense of *res judicata* is overruled.

July 29, 1949.

ALEXANDER HOLTZOFF
Judge

Seen
VICTOR H. KRAMER,
Attorney for Plaintiff.

1439 In the United States District Court
For the District of Columbia

(File Endorsement Omitted)

Civil Action No. 3472-47

UNITED STATES OF AMERICA,
PLAINTIFF
v.
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.,
DEFENDANTS

Judgment

(Filed July 29, 1949.)

This cause coming on to be heard upon the complaint, the answers and supplemental answers and the cause having been tried by the Court and, pursuant to the stipulation of the parties, evidence having been presented, it is this 29 day of July, 1949,

ADJUDGED, ORDERED AND DECREED that judgment herein be entered for the defendants.

ALEXANDER HOLTZOFF
Judge

Seen
VICTOR H. KRAMER
Attorney for Plaintiff

N/B

In the United States District Court
For the District of Columbia

1440 (File Endorsement Omitted)

Civil Action No. 3472-47

UNITED STATES OF AMERICA,
PLAINTIFF
v.
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.,
DEFENDANTS

Opinion—Filed Aug. 2, 1949

Action by the United States of America against the Washington Real Estate Board and others, to enjoin alleged violations of the Sherman Act. Judgment for the defendants.

Victor H. Kramer, Herbert N. Maletz, and C. Heyward Belser, all of Washington, D. C., for the plaintiff.

Roger J. Whiteford and Jo V. Morgan, Jr., both of Washington, D. C., for the defendants National Association of Real Estate Boards and Herbert U. Nelson.

William E. Leahy and William J. Hughes, both of Washington, D. C., for the defendants Washington Real Estate Board and others.

A. K. Shipe, of Washington, D. C., for the defendant J. Hawley Smith.

This is a civil action by the United States for an injunction to restrain the defendants from continuing
1441 alleged violations of the Sherman Antitrust Act. The suit is brought under Section 3 of the Act, U. S. Code, Title 15, Section 3. The pertinent portions of this section are as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the District of Columbia is declared illegal."

The defendants in this case are, first, the Washington Real Estate Board, which is a corporation having its place of business in the District of Columbia. Other defendants are members of the Board, who are sued as a class, a few of the members being named as representatives of the class. Finally, there is also joined as a defendant the National Association of Real Estate Boards, which is a corporation having its principal place of business in Chicago, Illinois. The National Association comprises among its members

various local real estate boards, and the Washington Real Estate Board is one of these members.

The Government contends that the defendants have combined to fix real estate brokerage commissions to be charged by real estate brokers in the District of Columbia. The Government urges that this activity constitutes a violation of the Sherman Antitrust Act.

In brief, the evidence shows that the membership of the Washington Board embraces about 250 real estate brokers out of a total number of about 2,000 brokers operating in the District of Columbia. The Washington Board has for many years prescribed fixed rates of commissions to be paid to brokers on sales of real property. The rates are published and are readily available to the public.

1442 All members of the Board are urged to use these rates. Actually, both members and many nonmembers employ them. There is nothing clandestine or surreptitious about this activity of the Washington Board. The National Association has been joined as a defendant on the theory that it has encouraged and has incited the Washington Board to fix and prescribe rates of commissions to be charged by the members of the latter.

In 1943 the rates were changed, resulting in higher charges in many instances and in lower commissions in other situations. In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board. For example, smaller commissions than the standard rate have been charged in connection with large developments comprising a great many homes.

No evidence has been introduced tending to show that the standard rate of commissions prescribed by the Washington Board is unreasonable or excessive or that this activity unduly or unreasonably restrains competition as between brokers or adversely affects the sales of real property. On the contrary, there is evidence in the record to the effect that before the Board attempted to fix standard commission rates there was chaos and confusion, resulting in occasional overcharges on the part of the less scrupulous members of the craft, and that one of the purposes of the Board was to eliminate this undesirable condition.

1443 The Government contends, however, that irrespective of whether it is reasonable or laudable, the fixing of commission rates is illegal *per se* and constitutes a violation of the Sherman Act.

Ever since the decisions of the Supreme Court in *Standard Oil Co. v. United States*, 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 6, it has been consistently held that the Sherman Act does not ban all restraints of trade, but prescribes only those that are unreasonable. In the two cases to which I have referred, the Court held that the Sherman Act must be construed in the light of reason and that the rule of reason must prevail.

In recent years it has been held by the Supreme Court that price-fixing is *per se* an unreasonable restraint of trade and, therefore, illegal in and of itself, even under the so-called rule of reason. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, and *United States v. Trenton Potteries Co.*, 273 U. S. 392. The cases in which this doctrine has been formulated and enunciated, however, involved prices of commodities and of articles of trade. This principle has never been invoked, so far, at any rate, in connection with charges for personal service. There is a vast distinction in principal between fixing the prices of commodities or articles, on the one hand, and prescribing charges for personal services, on the other hand.

A statement of the pertinent public policy in re-
1444 spect to personal services is to be found in the Clayton Act, U. S. Code, Title 15, Section 17. The statement is as follows:

"The labor of a human being is not a commodity or article of commerce."

This is a very important, basic pronouncement. The term "labor" as used in the Clayton Act is not limited to the work of manual laborers or of mechanics. It comprises intellectual labor as well. Neither is the term restricted to the work of the poor or the needy. Thus there are labor unions of mechanics, of clerks, of teachers, and of airplane pilots. Many other similar instances might be adduced. All of these organizations fix wages or salaries to be charged by their members. Such activities have never been held to form violations of the Sherman Act *per se*.

A real estate board may in a sense be likened to a labor union of real estate brokers. Admittedly there is no case in the Federal courts that has applied to personal services the rule that the fixing of prices of commodities or articles is *per se* an unreasonable restraint of trade. To contract for one's personal services is a fundamental right of every man. For men to combine to regulate the compensation to be charged by them for their own services is also entirely legal. While this right has been generally recognized in

respect to persons who toil for wages or salaries, no reason appears discernible why it is not equally applicable in principle to those persons who work for commissions. The instant case appears to be the first occasion in the history of the enforcement of the Sherman Act that Government has challenged this right.

1445 It is a matter of common knowledge that rates of commissions for brokers' services of various kinds have been openly prescribed by numerous organizations of brokers for a great many years. This activity has never been condemned as violative of the Sherman Act, and the Government has never so contended prior to this case. On the contrary, the resulting stabilization of charges and the consequent uniformity has generally been considered as being in the public interest. No reason is perceived for changing these principles as they have been heretofore understood.

The Court is of the opinion that for persons engaged in a particular occupation to fix or prescribe a standard charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act. A different problem might be presented if the rates fixed were shown to be unreasonable or oppressive in themselves or if it appeared that they resulted in a substantial diminution of competition or otherwise created an unreasonable restraint of trade or commerce. There is no such showing or even contention in this case.

Judgment for the defendants.

Counsel will submit proposed findings of fact and conclusions of law.

June 28, 1949.

ALEXANDER HOLTZOFF
United States District Judge

1446 In the United States District Court
For the District of Columbia

Civil Action No. 472-47

(Title Omitted)

(File Endorsement Omitted)

Petition for Appeal Filed Sept. 23, 1949.

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgment of this Court entered on the twenty-ninth day of July,

1949, does hereby pray an appeal from said final judgment to the Supreme Court of the United States. Pursuant to Rule 2 of the Rules of the Supreme Court plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the judgment erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that this appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

VICTOR H. KRAMER
Trial Attorney

Dated this 23rd day of September, 1949.

1447 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Order Allowing Appeal—Filed Sept. 23, 1949

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on the twenty-ninth day of July, 1949, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

T. ALAN GOLDSBOROUGH
United States District Judge

Dated this 23rd day of September, 1949.

1448 In the United States District Court
For the District of Columbia
Civil Action No. 3472-47
(Title Omitted)
(File Endorsement Omitted)

Assignment of Errors and Prayer for Reversal—Filed Sept. 23, 1949

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment in the district court on July 29, 1949, in the above-entitled cause, and says that the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in its order entered March 5, 1948 denying plaintiff's motion for judgment on the pleadings.

2. The court erred in finding that there was no proof that the standard rate of commissions published by the Washington Real Estate Board is unreasonable or that this activity unreasonably restrains competition between brokers or adversely affects the sale of real estate. (Finding 13).

3. The court erred in finding that before the Board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive over-
1449 charges, and that one of the purposes of the Board was to eliminate this undesirable condition (Finding 14).

4. The court erred in finding that the schedules of standard commissions published by the Washington Real Estate Board have been construed by the members as non-mandatory in character (Finding 16).

5. The court erred in finding that neither the defendant National Association of Real Estate Board nor the defendant Herbert U. Nelson conspired with the Washington Real Estate Board to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia (Finding 20).

6. The court erred in failing to grant the findings of fact requested by the plaintiff.

7. The court erred in concluding that the acts proved do not constitute violations of the Sherman Act (Conclusion 3).

8. The court erred in concluding that the action of the defendants in publishing a standard rate of commissions charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act, in the absence of a showing that such rates were unreasonable or oppressive in themselves or that they result in a substantial diminution of competition or otherwise create an unreasonable restraint of trade or commerce (Conclusion 1).

9. The court erred in concluding that the first sentence of Section 6 of the Clayton Act enunciates the pertinent policy applicable to the activities of the defendant real estate brokers (Conclusion 2).

1450 10. The court erred in concluding that for men to combine to regulate the compensation to be charged by them for their own services is entirely legal (Conclusion 2).

11. The court erred in failing to hold that the fixing, by combination, of real estate brokerage commission rates in the District of Columbia constitutes, *per se*, a violation of Section 3 of the Sherman Act.

12. The court erred in failing to hold that an agreement among real estate brokers fixing commission rates to be charged by them in the District of Columbia unreasonably restrains trade and commerce of real estate brokers in violation of Section 3 of the Sherman Act.

13. The court erred in failing to hold that an agreement among real estate brokers fixing commission rates to be charged by them in the District of Columbia unreasonably restrains trade and commerce in real estate in violation of Section 3 of the Sherman Act.

14. The court erred in entering judgment for the defendants.

Wherefore, plaintiff prays that the final judgment for the defendants entered by the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

VICTOR H. KRAMER
HERBERT N. MALETZ
C. HEYWARD BELSER
Attorneys for Plaintiff

Dated this 23rd day of September, 1949.

1451 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Citation—Filed Sept. 23, 1949

To:

National Association of Real Estate Boards
Washington Real Estate Board

Herbert U. Nelson	S. Miles Montgomery
J. Garrett Beitzell	F. Moran McConihe
Lewis T. Breuninger	William L. Orem, Jr.
Lewis F. Colbert	Thomas W. Sandoz
S. Dolan Donohoe	J. Hawley Smith
C. H. Hillegeist	Raymond M. Taylor
Edward K. Jones	DeVere R. Weedon
William L. Lebling	Carey Winston

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in Washington, D. C., within forty (40) days from the date hereof, pursuant to an order allowing an appeal from the final judgment made and entered in the above-entitled cause on July 29, 1949, in an action wherein the United States of America is appellant and you are appellees, to show cause why the judgment rendered against the said appellant should not be corrected.

WITNESS, the Honorable T. Alan Goldsborough, Judge of the United States District Court for the District of Columbia.

T. ALAN GOLDSBOROUGH
United States District Judge

This 23rd day of September, 1949.

1464 In the United States District Court
For the District of Columbia
Civil Action No. 3472-47
(Title Omitted)
(File Endorsement Omitted)

Request to Transmit Original Documents—Filed Sept. 26, 1949

In the above-entitled cause the United States of America, plaintiff-appellant herein, having filed a petition for appeal to the United States Supreme Court, does respectfully REQUEST this Court to issue an order directing the clerk of this Court to certify and transmit to the Clerk of the Supreme Court the original papers and documents specified in the *praecipe* to the clerk of this Court as the transcript of the record on appeal.

Victor H. Kramer
VICTOR H. KRAMER
Attorney for Plaintiff

This 26th day of September, 1949.

1465 In the United States District Court
For the District of Columbia
Civil Action No. 3472-47
(Title Omitted)
(File Endorsement Omitted)

Praecipe for Transcript of Record—Filed Sept. 26, 1949

To:

THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript, in the order given below, the following papers, viz.:

Complaint filed August 27, 1947:	1246–1256
Answers of the National Association of Real Estate Boards and Herbert U. Nelson filed December 1, 1947:	1264–1275
Answer of J. Hawley Smith filed December 1, 1947:	1277
Answer of all defendants except National Association of Real Estate Boards, Herbert U. Nelson and J. Hawley Smith filed December 1, 1947:	1278–1286

Plaintiff's Motion for Judgment on the Pleadings filed January 3, 1948: 1288
Plaintiff's Memorandum of Points and Authorities Cited in Support of its Motion for Judgment on the Pleadings filed January 3, 1948, and Notices of Service thereof: .....
Memorandum of defendants National Association of Real Estate Boards and Herbert U. Nelson in opposition to Motion for Judgment on the Pleadings, filed January 19, 1948: 1289–1308
Answer to Motion for Judgment on the Pleadings filed by all defendants except National Association of Real Estate Boards, Herbert U. Nelson and J. Hawley Smith, filed January 19, 1948: 1310–1312
Plaintiff's Reply Memorandum in Support of its Motion for Judgment on the Pleadings filed February 3, 1948 and Notices of Service thereof: .....
1466 Informal Memorandum of Justice Letts overruling motion for Judgment on the Pleadings filed March 1, 1948: .. 1313
Order Overruling Plaintiff's Motion for Judgment on the Pleadings filed March 5, 1948: 1314
Answer to Plaintiff's Motion for Advancement filed by National Association of Real Estate Boards on June 10, 1948: 1318–1322
Stipulation filed May 24, 1948 in Criminal Action No. 950-47: 832–833
Stipulations of Authenticity and Genuineness and for use of Documents in Criminal Action No. 950-47 filed May 24, 1948 820–826
Transcript of Proceedings in District Court (Judge Holtzoff) on November 9, 1948: 1092–1100
Stipulation filed June 22, 1949: 1426–1427
Transcript of Proceedings in Criminal Action No. 950-47 dated May 24, 25, 26, 27, and 28, 1948 and June 1, 2, and 4, 1948 (pages numbered 1 through 773): 1–773
Government Exhibits 1-13, 15-17, 17A, 18-38, 40, 42, 45, 46, 48, 49, 51-53 (all numbers are inclusive): ..... Unnumbered

Transcript of Proceedings in District Court (Judge Holtzoff) on June 27, 1949: 1102–1201
Plaintiff's Proposed Findings of Fact filed July 27, 1949: 1429–1434
Transcript of Opinion of Judge Holtzoff dated June 28, 1949: 1440–1445
Transcript of Proceedings in District Court (Judge Holtzoff) on July 28, 1949: 1211–1224
Findings of Fact and Conclusions of Law filed July 29, 1949: 1435–1438
Final Judgment of the District Court filed July 29, 1949: 1439
Affidavit with respect to Defendants' Proposed Findings of Fact with accompanying exhibits filed September 23, 1949:
Assignment of Errors and Prayer for Reversal filed September 23, 1949: 1448–1450
The Petition for Appeal filed September 23, 1949: 1446
Statement of Jurisdiction with opinion attached filed September 23, 1949: 1453–1462
Order Allowing Appeal filed September 23, 1949: 1447
Citation filed September 23, 1949: 1451
Statement required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States filed September 23, 1949: 1453–1462
Proof of Service of Appeal papers: 1463
Request to Transmit Original Documents: 1464
1467 Order to Certify and Transmit Original Documents: 1469
This Praecipe: 1465–1467
Proof of Service of this Praecipe: 1468
Clerk's Certificate. 1481

VICTOR H. KRAMER

VICTOR H. KRAMER
Attorney for Plaintiff

1468 CERTIFICATE OF SERVICE

I certify that I have, this 26th day of September, 1949, served a copy of the attached (1) REQUEST TO TRANSMIT ORIGINAL DOCUMENTS, (2) ORDER TO CERTIFY AND TRANSMIT ORIGINAL DOCUMENTS, and (3) PRAECIPE FOR TRANSCRIPT OF RECORD by mailing a copy of, postpage prepaid, to the attorneys for each of them, as follows:

ROGER J. WHITEFORD and JOHN J. WILSON
815 – 15th Street, N. W.
Washington, D. C.
Attorneys for the defendants, National Association of Real Estate Boards and Herbert U. Nelson

WILLIAM E. LEAHY and WILLIAM J. HUGHES
821 – 15th Street, N. W.
Washington, D. C.
Attorneys for the defendants, Washington Real Estate Board and individual defendants other than Herbert U. Nelson and J. Hawley Smith

WALTER M. BASTIAN and A. K. SHIPE, JR.
National Press Building
Washington, D. C.
Attorneys for defendant, J. Hawley Smith

VICTOR H. KRAMER
VICTOR H. KRAMER
Attorney for the United States

1469 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Order to Certify and Transmit Original Documents — Filed Sept. 26, 1949

In the above-entitled cause the United States of America, plaintiff-appellant herein, has applied for an order directing the clerk of this court to certify and transmit to the Clerk of the Supreme Court of the United States the origi-

nal papers and documents specified in the praecipe to the clerk of this court as the transcript of the record on appeal.

It is Therefore Ordered

That the request be and the same is hereby granted, and the clerk of this court is directed to certify and transmit to the Supreme Court of the United States the original papers and documents specified in the praecipe.

T. Alan Goldsborough

This 26th day of September, 1949

1470 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Counterpraecipe for Transcript of Record—Filed Sept. 30, 1949

Come now the defendants, by their undersigned attorneys, and counterdesignate as the transcript of record to be prepared by the clerk, pursuant to Supreme Court Rule 10, the following:

The entire record of this action in this Court which includes, pursuant to the stipulation of June 22, 1949, the entire record in this Court in Criminal Action 950-47, including, but not limited to, the indictment, judgment, all transcripts, and the docket and jacket entries.

However, by so requesting that the clerk prepare a transcript of the entire record in this cause, the defendants do not admit that the "Affidavit with respect to Defendants' Proposed Findings of Fact with accompanying exhibits filed September 23, 1949", purported to be designated as part of the record on appeal by the plaintiff, is properly a part of the record or was a proper document to file, and with respect to such purported part of the record all the defendants make the objection as to the admissibility of such document referred to in Supreme Court Rule 16. The defendants also invite the attention of the clerk to the fact that memoranda of points and authorities, some

1471 of which are purported to be designated by plaintiff,

are not a part of the record, and likewise may not form a part of the transcript.

ROGER J. WHITEFORD
Roger J. Whiteford
JO V. MORGAN, JR.
Jo V. Morgan, Jr.
Attorneys for defendants
National Association of Real Estate Boards
and Herbert V. Nelson

WILLIAM E. LEAHY
William E. Leahy
WILLIAM J. HUGHES, JR.
William J. Hughes, Jr.
Attorneys for all other defendants
except J. Hawley Smith

WALTER M. BASTIAN
Walter M. Bastian
A. K. SHIPE
A. K. Shipe
Attorneys for defendant
J. Hawley Smith

CERTIFICATE OF SERVICE

I certify that on this 30th day of September, 1949, I mailed, postage prepaid, a copy of the foregoing Counterpraecipe to Victor H. Kramer, Esq., Department of Justice, Washington, D. C., Attorney for the plaintiff.

JO V. MORGAN, JR.
Jo V. Morgan, Jr.
An attorney for defendants
National Association of Real Estate Boards
and Herbert V. Nelson.

1472 In the United States District Court
For the District of Columbia
Civil Action No. 3472-47
(Title Omitted)
(File Endorsement Omitted)

Motion to Set Aside or Modify the Order to Certify and Transmit Original Documents—Filed Oct. 3, 1949

Come now the defendants, by their undersigned attorneys, and move this Honorable Court that it set aside or modify its Order to Certify and Transmit Original Documents dated September 26, 1949.

And for cause of this motion the defendants say that the order was entered without notice to them, nor an opportunity to be heard, as is indicated by the certificate of Victor H. Kramer which accompanied the copy of the order mailed to the defendants.

And in further cause of this motion the defendants say that the order provides only for the transmittal of a transcript of record in accordance with the praecipe filed by plaintiff, whereas the defendants have now filed, pursuant to and within the time allowed by Supreme Court Rule 10, a Counterpraecipe, designating additional parts of the record for inclusion in the transcript, which should also be included within the terms of the order.

And for further cause of this motion, defendants say that the order, possibly thru inadvertance, seems to direct the inclusion in the transcript certain documents which are not part of the record in this cause, to wit:

1473 (1) Memoranda of points and authorities, filed January 3, 1948, January 19, 1948, and February 3, 1949.

(2) Affidavit with respect to Defendants' Proposed Findings of Fact with accompanying exhibits filed September 23, 1949.

Inasmuch as these documents are not part of the record herein, they may not be designated.

And the defendants further say that they concur in the request of the plaintiff that original documents be transmitted so as to save time and expense, but merely request that the entire record designated, and nothing but the true record, be transmitted.

ROGER J. WHITEFORD
Roger J. Whiteford
JO V. MORGAN, JR.
Jo V. Morgan, Jr.
Attorneys for defendants
National Association of Real Estate Boards
and Herbert V. Nelson

WILLIAM E. LEAHY
William E. Leahy
WILLIAM J. HUGHES, JR.
William J. Hughes, Jr.
Attorneys for all other defendants
except J. Hawley Smith

WALTER M. BASTIAN
Walter M. Bastian
A. K. SHIPE
A. K. Shipe
Attorneys for defendant
J. Hawley Smith

1474 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Statement Concerning Designation of Record—Filed Oct. 20, 1949

On the 14th day of October, 1949, there was argued before me a motion filed by the defendants in the above-entitled case, styled MOTION TO SET ASIDE OR TO MODIFY ORDER TO TRANSMIT ORIGINAL DOCUMENTS, and having for one purpose the elimination from the documents designated for transmittal to the United States Supreme Court one document styled AFFIDAVIT WITH RESPECT TO DEFENDANTS' PROPOSED FINDINGS OF FACT. The plaintiff-appellant took the position that the appellate tribunal was necessarily the proper forum to settle issues as to the content of the record to be brought before it in order that the right of appeal might be fully preserved from infringement. It was my view, however, that proposed findings are not properly a part of the record. For that reason I granted the motion and directed counsel to prepare an order removing the said affidavit from the appellate record.

I am making this statement for inclusion in the record in an effort to ensure for plaintiff-appellant the right to a review of the issue as to whether the district court or the appellate tribunal ought by law to determine the content of the appellate record.

Dated: 19th of October, 1949

T. ALAN GOLDSBOROUGH
United States District Judge

Consented to
CLINCH HEYWARD BELSER
Atty. for Plaintiff

No objection as to form:
JO V. MORGAN, JR.
Representing, as to this matter, all defendants.

1475 In the United States District Court
For the District of Columbia

Civil Action No. 3472-47

(Title Omitted)

(File Endorsement Omitted)

Order Modifying Order to Certify and Transmit Original Documents—Filed Oct. 20, 1949

Upon consideration of defendants' Motion to Set Aside or Modify the Order to Certify and Transmit Original Documents, of the plaintiff's Praecipe for Transcript of Record, and of the defendants' Counterpraecipe for Transcript of Record, and of the oral argument upon said motion, it is, by the Court, this 19th day of October, 1949,

ORDERED, that this Court's Order to Certify and Transmit Original Documents dated September 26, 1949, be and is hereby, modified and amended by deleting the last sentence, and substituting the following:

That the request be and is hereby granted in part, and the clerk of this Court is directed to certify and transmit to the Supreme Court of the United States the original papers and documents constituting the entire record in the above entitled cause, including but not limited to the entire record in Criminal Action No. 950-47, this Court.

AND THE CLERK IS FURTHER DIRECTED, AND IT IS HEREBY ORDERED that memoranda of points and athorities, including the Memoranda of Points and Authorities filed January 3, 1948, January 19, 1948 and February 3, 1948, designated by plaintiff, and the Affidavit with respect to Defendants' Proposed Findings of Fact with accompanying exhibits filed September 23, 1949, also designated by plaintiff, are not part of the record in the above entitled cause, and will not be so transmitted.

T. ALAN GOLDSBOROUGH
Judge

No objection as to form

CLINCH HEYWARD BELSER
Atty. for Plaintiff

Consented to for all defendants
by Jo V. MORGAN, JR.

1481 United States District Court
For the District of Columbia

United States of America, } ss.:
District of Columbia. }

I, HARRY M. HULL, Clerk of the United States District Court for the District of Columbia, do hereby certify the foregoing pages numbered 1 to 1480, inclusive, to be the originals and or true and correct copies of the originals of all papers and proceedings designated and ordered transmitted to the Supreme Court of the United States as the record on appeal in the case of the UNITED STATES OF AMERICA, Plaintiff, vs. NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, *et al.*, Defendants, Civil Action No. 3472-47; except the following:

The original exhibits as filed July 28, 1949, are not included in this record for the reason same are being transmitted under separate certificate.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of October, 1949.

HARRY M. HULL, *Clerk*
By ROBERT M. STEARNS
Deputy Clerk

(SEAL)

1482 *Government's Exhibit 1*

ROSTER
OF
WASHINGTON REAL
ESTATE BOARD
"An Association of Realtors"

All realtors are real estate brokers...
but not all real estate brokers are *realtors*

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lightly held. The Real Estate Board members listed herein are all Washington REALTORS . . . Avail yourself of their services to assure yourself complete protection and competent real estate counsel . . . at no extra cost.

WASHINGTON REAL ESTATE BOARD
Executive Offices
1417 K Street, N. W.
National 4494
FEBRUARY, 1947

Acacia Mutual Life Ins. Co.
51 Louisiana Ave., N. W.—1—Na. 4506
Aldon Construction Co.
515 Woodward Bldg.—5—Na. 5740
American Bldg. Assn.
300 Pa. Ave., S. E.—3—Li. 0130
American Co., The
807 15th St., N. W.—5—Na. 8032
American Security & Trust Co.
15th and Pa. Ave., N. W.—5—Na. 4815
Bacas, Aris H.
1114 H St., N. W.—5—Di. 6234
Bangs, H. Clifford
Investment Building—5—Me. 0240
Banks & Lee, Inc.
Tower Building—5—Re. 1506
Barkley Brothers
1010 Vermont Ave., N. W.—5—Na. 9250
Bartow Realty Co., Inc.
1331 G St., N. W.—5—Me. 2495
Beitzell, J. Garrett
1515 K St., N. W.—5—Di. 3100
Bellfore, Joseph F.
1311 L St., N. W.—1—Di. 5522
Bennett, Gatewood S.
1427 Eye St., N. W.—5—Na. 6341
Berens, Frederick W., Inc.
1528 K St., N. W.—5—Na. 9141
Berry & Son, J. McKenney
1363 Wis. Ave., N. W.—7—Mi. 0513
Blackistone, R. S.
927 18th St., N. W.—6—Na. 2690
Blumer Co., Frederick A.
617 Pa. Ave., S. E.—3—Fr. 1088
Boaz, J. Noble
7240 Wis. Ave., Bethesda—14—Md. Wi. 7500
Borger, George I.
643 Indiana Ave., N. W.—4—Na. 0350
Boss & Phelps
1417 K St., N. W.—5—Na. 9300
Bowie, C. Calvert
Washington Bldg.—5—Re. 7121
Bradley, Beall & Howard, Inc.
222 Southern Building—5—Na. 0271
Breuninger & Sons, Inc., L. E.
1730 K St., N. W.—6—Na. 2040
Brodie & Colbert, Inc.
1931 K St., N. W.—6—Na. 8875
Brown, Walter A.
1415 Eye St., N. W.—5—Na. 1652
Bruno Co., Joseph E.
903 H St., N. W.—1—Na. 3433
Buchanan, J. Wesley
1732 K St., N. W.—6—Me. 1143
Burgess, Nettie Mae
6109 Broad St.—Friendship Sta. 16—Brookmont, Md.—Wi. 4233
Burnside, Bradford L.
927 15th St., N. W.—5—Na. 2714
Burr, Chas. E.
Mills Bldg.—6—Di. 7516
Cafritz Co.
1406 K St., N. W.—5—Di. 9080
Capital View Realty Co.
925 N. York Ave., N. W.—1—Na. 9797
Carr, Edward R.
1332 H St., N. W.—5—Na. 1805
Carr, Oliver T.
Mills Bldg.—6—Na. 2865
Carry Properties, Albert
1311 G St., N. W.—5—Di. 7080
Cassel, Nelle Lowe
1432 Wisconsin Ave., N. W.—7—Ad. 2118
Columbia Federal Savings & Loan Assn.
716 11th St., N. W.—1—Re. 7111
Conner, J. Merrill
Investment Bldg.—5—Di. 2002
Conner & Ryon
927 18th St., N. W.—6—Re. 3216

Cooley Bros.
Investment Bldg.—5—Di. 1481
Crandall, Paul D.
827 Investment Bldg.—5—Ex. 3887
Crane & Helan
8248 Ga. Ave., Sil. Spring, Md.—Sl. 4000
Crumbaugh, A. D.
4908 Wis. Ave., N. W.—16—Wo. 1364
Davidson & Davidson
1013 15th St., N. W.—5—Na. 1512
Davis Co., Floyd E.
1629 K St., N. W.—6—Na. 0352
District Building & Loan Assn.
#4 Thomas Circle—5—Na. 5927
District Lawyers & Wash. Title Ins. Cos.
1413 Eye St., N. W.—5—Na. 8885
Donnelly, J. Lee
Investment Bldg.—5—Na. 3317
Donohoe & Sons, John F.
314 Pa. Ave., S. E.—3—Li. 0084
Doyle, Frank M.
927 15th St., N. W.—5—Di. 7965
Dreyfuss Bros.
1019 15th St., N. W.—5—Na. 0582
Drury Realty Corp.
1737 K St., N. W.—6—Re. 1133
Dunigan, Inc., D. J.
Tower Bldg.—5—Na. 1265
Dunne, R. G.
604 H St., N. E.—2—At. 8500
Duty, G. G.
1024 Vermont Ave., N. W.—5—Na. 4482
Eastern Bldg. & Loan Assn.
336 Pa. Ave., S. E.—3—Tr. 6800
Ellis, Edwin L.
1010 Vermont Ave.—5—Re. 5140
Ellis, Wm. R.
1539 Eye St., N. W.—5—Di. 2029
Equitable Coop. Bldg. Assn.
915 F St., N. W.—1—Na. 1741
Equitable Life Ins. Co.
816 14th St., N. W.—5—Re. 6161
Fidelity Mortgage Inv. Co.
1105 E St., N. W.—4—Na. 2431
Fidelity Storage Co., R. E. Dept.
1420 You St., N. W.—9—No. 3400
First Federal Savings & Loan Assn.
610 13th St., N. W.—5—Di. 2370
Fisher, Jess & Co.
913 N. York Ave., N. W.—1—Re. 8060
Fisher & Co., Inc., Thos. J.
738 15th St., N. W.—5—Di. 6830
Fitch, Fox & Brown
921 17th St., N. W.—6—Na. 0301
Flather, Jr., Inc., Wm. J.
1508 H St., N. W.—5—Na. 1753
Gardiner & Co., A. S.
1631 L St., N. W.—6—Na. 0334
Garvin, O. H.
Earle Bldg.—4—Ex. 2223
Gilliat & Co.
2827 Dumbarton Ave., N. W.—7—De. 2770
Godden & Small
Woodward Bldg.—5—Na. 7831
Grady & Son, J. Dallas
1104 Vermont Ave., N. W.—5—Di. 3750
Graham Hall
7502 Old Georgetown Rd., Bethesda, 14, Md.—Wi. 3250
Graham & Ogden
Woodward Bldg.—5—Na. 3689
Gravatte, L. T.
729 15th St., N. W.—5—Na. 0753
Graves, S. C.
1147 Conn. Ave., N. W.—6—Na. 2819
Groomes, L. W.
1719 Eye St., N. W.—6—Na. 1768
Gunn, Charles S.
326 Pa. Ave., S. E.—3—Fr. 1206
Hagner & Co., Randall H.
1321 Conn. Ave., N. W.—6—De. 3600
Hall, Richard B.
1427 Eye Street, N. W.—5—Na. 4085
Hampton, Thos. E.
8015 Wis. Ave., Bethesda, 14, Md. Wi. 2425
Handy, Levin P.
Southern Bldg.—5—Re. 6664
Harlan & Co., Laura
1205 19th St., N. W.—6—Na. 4031
Hartman Realty, Inc.
1343-1345 Good Hope Rd., S. E.—20—Tr. 7606
Hayes, Inc., Jack
2020 P St., N. W.—6—Du. 7784
Herbert & Sons, Joseph A.
515 E. Capitol St.—3—Li. 0129

Hill, Frances Powell
1608 20th St., N. W.—9—De. 4101
Hill Co., Inc., Wm. Corcoran
710 Jackson Pl., N. W.—6—Di. 1283
Hillegeist Co., C. H.
923 15th St., N. W.—5—Na. 8500
Hines, N. C.
Investment Bldg.—5—Di. 7789
Hohenstein Bros.
652 H St., N. E.—2—Fr. 3000
Hollander, Robert B.
1009 N. York Ave., N. W.—1—Na. 9743
Holther, Harriet
1734 K St., N. W.—6—Na. 2166
Humphries, R. A.
808 N. Capitol St.—2—Na. 6733
Jarrell Co., Thos. E.
721 10th St., N. W.—1—Na. 0765
Jones & Co., Inc., Edw. H.
5520 Conn. Ave., N. W.—15—Wo. 2300
Kass Realty Co.
4461 Conn. Ave., N. W.—8—Em. 8100
Kelley & Brauner
1427 Eye St., N. W.—5—Di. 7740
Kessler, Bruce R.
927 15th St., N. W.—5—Na. 9354
Keyser & Son, A. G.
1627 K St., N. W.—6—Na. 5524
Koones & Co., Chas. C.
Southern Bldg.—5—Di. 8157
Lamb, Leon F.
927 15th St., N. W.—5—Di. 0476
Landvoigt, Albert E.
815 15th St., N. W.—5—Di. 7686
Latimer, Roberts E.
7733 Alaska Ave., N. W.—12—Ge. 1270
Lawyers Title Ins. Corp. of Richmond
923 15th St., N. W.—5—Re. 1075
Lebling, Wm. L.
7200 Wis. Ave., Bethesda, 14, Md.—Wi. 1122
Lee, Adelbert W.
211 Pa. Ave., S. E.—20—Li. 1000
Legum & Gerber Realty Co.
2637 Conn. Ave., N. W.—8—Ad. 7800
Lipkins Co., Geo. W.
1818 N. St., N. W.—6—Di. 8688
Loughborough Development Corp.
6701 Hillandale Rd., Chevy Chase, 15, Md.—OL. 3240
Loveless, Harry R.
1627 K St., N. W.—6—Na. 7298
Marceron, R. V.
Metropolitan Bank Bldg.—5—Na. 6588
Martin & Co., S. R.
2645 Conn. Ave., N. W.—8—Du. 5366
Maryland Real Estate Co.
8634 Colesville Rd., Silver Spring Md.—Sh. 5100
Massachusetts Mutual Life Ins. Co.
E. B. Woodruff, Mgr., R. E. Dept.
Tower Bldg.—5—Na. 3368
McDevitt, Amos W. (Service Realty Co.)
8512 Colesville Rd., S. S., Md.—Sh. 4421
McKeever Co., Inc., J. A.
1614 K St., N. W.—6—Di. 9706
McKeever Co., Robert L.
Shoreham Bldg.—5—Na. 4756
McKenna, John J.
1429 Eye St., N. W.—5—Re. 5345
McLachlen Banking Corporation
1001 G St., N. W.—1—Na. 0430
Metzler, Cuvier A.
1106 Vermont Ave., N. W.—5—Di. 8600
Middleton, F. Eliot
Investment Bldg.—5—Re. 1181
Miller Development Co., W. C. & A. N.
4830 Mass. Ave., N. W.—16—Or. 4464
Miller, George D.
Mills Bldg.—6—Di. 3355
Miller, John H., Jr. & Bro.
1812 Kay St., N. W.—6—Na. 2557
Mills, Benjamin J.
Tower Bldg.—5—Me. 4900
Mohler, Jr., J. Rupert
1223 Conn. Ave., N. W.—6—Na. 4080
Mollan, Wm. W.
927 15th St., N. W.—5—Ex. 0347
Monroe Development Corp.
1414 Monroe St., N. W.—10—Ad. 4206
Moore & Hill Co.
804 17th St., N. W.—6—Me. 4100
Morgan, A. H.
The Texas Co., P. O. Box 971, Alex., Va.

Moss, George J.
8512 Colesville Rd. Silver Spring Md.—Sh. 2600

Moss, Roger S.
2125 R. I. Ave., N. E.—18—Ho. 6020

Mount Vernon Mortgage Corp.
206 Machinist's Bldg.—1—Na. 5536

Munsey Trust Co.
Munsey Building—4—Na. 8080

Murray Co.
1229 L St., N. W.—5—Na. 7266

National Capital Bank of Washington
316 Pa. Ave., S. E.—3—At. 4500

Natl. Liberty Ins. Co. of America
1522 K St., N. W.—5—Na. 5753

National Metropolitan Bank
613 15th St., N. W.—5—Na. 1308

National Mortgage & Inv. Corp.
1312 N. Y. Ave., N. W.—5—Na. 5833

National Perm. Bldg. Assn.
719 10th St., N. W.—1—Na. 0254

National Savings & Trust Co.
15th & N. Y. Ave., N. W.—5—Na. 9480

Norris, Charles L.
2135 Pa. Ave., N. W.—7—Re. 2112

North Washington Housing Corp.
7990 Ga. Ave., S. S. Md.—Sh. 5900

O'Connor, John J.
Investment Bldg.—5—Di. 5252

Owen & Son, Thos. J.
435 Southern Bldg.—5—Na. 3090

Owens Realty Co.
1020 18th St., N. W.—6—Me. 0486

Owings, Frank
631 E St., N. W.—4—Na. 3422

Parker Co., C. H.
435 Fourth St., S. W.—4—Na. 2326

Pearson, Stanley
8236 Ga. Ave., S. S. Md.—Sl. 5400

Peddicord, Robert
739 15th St., N. W.—5—Di. 0010

Perpetual Building Ass'n.
11th and E Sts., N. W.—4—Na. 4500

Phifer, Eugene H.
Tower Building—5—Na. 0080

Phillips, Frank S.
927 15th St., N. W.—5—Di. 1411

Phillips, Thomas L.
3518 Conn. Ave., N. W.—8—Wo. 7900

Phillips, Canby and Fuller, Inc.
1012 15th St., N. W.—5—Na. 4600

Pratt Co., Inc., F. M.
1017 K St., N. W.—1—Na. 868

Ragsdale, Wm. B.
1420 K St., N. W.—5—Na. 6966

Real Estate & Columbia Title Ins. Co.
503 E St., N. W.—1—Na. 3788

Realty Associates, Inc.
1022 17th St., N. W.—6—Ex. 1522

Realty Management Corp.
1427 Eye St., N. W.—5—Na. 3244

Ripley, R. P.
8403 Ga. Ave., S. S., Md.—Sh. 7539

River Terrace Co.
3435 Benning Rd., N. E.—19—Tr. 2800

Robb, Inc., Henry J.
1024 Vermont Ave., N. W.—5—Di. 8141

Roberts, Eugene B.
1327 Conn. Ave., N. W.—6—Du. 2259

Rosinski, Carl G. & Co.
Homer Bldg.—5—Na. 9254

Rust Co., H. L.
1001 15th St., N. W.—5—Na. 8100

Safeway Stores, Inc., F. G. Kayhoe
1845 4th, N. E.—1—Ho. 1285

Sandoz, Inc.
2 DuPont Circle—6—Du. 1234

Saul Co., B. F.
925 15th St., N. W.—5—Na. 2100

Saunders Co., Inc., Wm. H.
1519 K St., N. W.—5—Di. 1015

Savage, Robert W.
813 Union Trust Bldg.—5—Na. 3630

Schneider Corp., T. F.
811 15th St., N. W.—5—Na. 6339

Schwab, James E.
5522 Conn. Ave., N. W.—15—Or. 5800

Schwartz, William
1427 Eye St., N. W.—5—Ex. 7088

Scott, Emma Moore
1510 31st St., N. W.—7—Di. 1164

Scrivener & Bro., John
734 9th St., N. W.—1—Di. 3560

Seidenspinner, A. H.
802 Wash. Balto. Blvd., Riverdale, Md.—Wa. 1010

Senate Realty Company
1109 Eye St., N. W.—5—Ex. 3276

Shannon & Luchs Co.
1505 H St., N. W.—5—Na. 2345

Shea, James McDonald
1811 Columbia Rd., N. W.—9—Ad. 3500

Sherwin, C. Allen
4241 Wisc. Ave., N. W.—16—Em. 4450

Shipley, Walter L.
927 15th St., N. W.—5—Na. 1956

Shockey and Moorhead
3429 14th St., N. W.—10—Ad. 0021

Shoemaker, Louis P. (Edgar D. Turner)
1719 K St., N. W.—6—Na. 1166

Simpson & Co., Inc., C. W.
1024 Vermont Ave., N.W.—5—Me. 5700

Smith, Inc., E. Quincy
1418 H St., N. W.—5—Di. 9057

Smith, Fred A.
1413 17th St., N. W.—6—Re. 6661

Smithy Co., H. G.
811 15th St., N. W.—5—Na. 5903

Spruce, Samuel S.
Tower Bldg.—5—Na. 4905

Standard Properties
Woodward Building—5—Na. 5573

Stevens, Albert Howard
3272 P St., N. W.—7—Mi. 2908

Stickle, Wilmer F.
1610 K St., N. W.—6—Na. 1405

Stimson, Richard D.
1427 Eye St., N. W.—5—Na. 6680

Stone, Paul P.
5000 Conn. Ave., N. W.—8—Or. 2244

Stone, Inc., Paul T.
927 15th St., N. W.—5—Na. 0856

Story & Co.
804 17th St., N. W.—6—Me. 4100

Suburban Title Inv. Corp.
925 15th St., N. W.—5—Re. 7665

Sullivan Brothers
1520 K St., N. W.—5—Me. 4323

Taylor, Inc., Waverly
1028 Conn. Ave., N. W.—6—Re. 1360

Thomas, William M.
815 15th St., N. W.—5—Di. 1703

Thornton, H. L.
405 Butternut St., N. W.—12—Ge. 2291

Throckmorton, Wm. M.
Investment Building—5—Di. 7092

Tompkins, Chas. H.
907 16th St., N. W.—6—Di. 0042

Troiano, Pat
827 14th St., N. W.—5—Na. 3560

Tucker, James E.
3515 14th St., N. W.—10—No. 1632

Turner, Lloyd R.
600 7th St., S. W.—4—Me. 1647

Tyler & Rutherford, Inc.
1726 H St., N. W.—6—Re. 5245

Vernon, Benjamin H.
1427 Eye St., N. W.—5—Na. 6680

Waggaman-Brawner Realty Corp.
1700 Eye St., N. W.—6—Me. 3800

Walker & Dunlop, Inc.
1200 15th St., N. W.—5—Di. 0222

Walker, Curtis
Southern Building—5—Me. 4634

Walshe, Inc., P. J.
1115 Eye St., N. W.—5—Na. 6468

Waple Co., Marshall J.
1224 14th St., N. W.—5—Di. 3346

Washington Loan & Trust Co.
9th and F Sts., N. W.—4—Na. 3440

Washington Permanent Bldg. Ass'n.
629 F St., N. W.—4—Re. 6293

Washington Properties, Inc.
2600 Woodley Rd., N. W.—8—Co. 2000

Weaver Bros., Inc.
Washington Bldg.—5—Di. 8300

Weedon & Co., Inc., J. C.
1727 K St., N. W.—6—Me. 3011

Weinberg Co., J. A.
1707 H St., N. W.—6—Na. 5500

Weschler & Son, Inc., Adam A.
905 F St., N. W.—4—Na. 1281

Wesley, Ottis H.
806 Investment Bldg.—5—Na. 7476

Whiteford, Inc., Guy
1426 K St., N. W.—5—Re. 6340

Winkler, Mark
1417 Va. Ave., N. W.—5—Re. 5200
Winston Co., Carey
739 15th St., N. W.—5—Re. 3733
Wire, Preston E.
1526 K St., N. W.—5—Re. 1690
Wise, Joseph M.
1382 Wis. Ave., N. W.—7—Du. 0280
Woodward, James Morris
723 20th St., N. W.—6—Di. 5808
Worthington & Son, George Y.
1719 Eye St., N. W.—6—Na. 3326
Young, Gorman P.
1405 K St., N. W., Tower Bldg.—5—Di. 2328
Y. & O. Realty Company
833 L St., N. E.—2—At. 5176
Zantzinger, Richard C.
945 K St., N. W.—1—Na. 5371

1486 *Government's Exhibit 2*

NEW MEMBERS

Berens, Sales Inc., Fred W.
1528 K St., N. W.—5—Na. 9141
Boswell, Inc., Perry
3304 R. I. Ave., Mt. Rainier, Md.—Wa. 4500
Brown Realty Corp, Inc.
1300 13th St., N. W.—5—Du. 8558
Canby, Wm. M.
Mills Bldg.—6—Re. 3732
Carozza Co., A. A.
2327 Pa. Ave., S. E.—20—At. 8941
Chapman Realty Co., Inc.
1220 14th St., N. W.—5—Re. 3316
Cushard, Inez
4839 Wis. Ave., N. W.—16—Or. 4232
de Sibour & Co., John R.
17 Dupont Circle—6—Mi. 6300
Hermann, Walter
702 Woodward Bldg.—5—Na. 4493
Karr, Sydney H.
8002 Wis. Ave., Bethesda, Md.—Ol. 1066
Kennedy, Lyle
1025 Conn. Ave., N. W.—Na. 2266
King Co., George S.
2110 Nichols Ave., S.E.—20—Li. 2501
Kolb Co., Inc., J. Leo
1237 Wis. Ave., N. W.—7—Mi. 2100
McInerney & Co., Martin
405 Investment Bldg.—5—Di. 5014
Murphy, Charles D.
1401 25th St., S. E.—20—At. 2239
Rice, John H.
412 5th St., N. W.—1—Ex. 2845
Richardson Real Estate Co.
927 15th St., N. W.—5—Ex. 5481
Ring Management Co.
1118 Woodward Bldg.—5—Na. 5657
Tammaro, Samuel
927 15th St., N. W.—5—Na. 8059
Tripp, Henry L.
1311 L St., N. W.—5—Na. 6705
Walsh, Inc., Thos. D.
815 11th St., N. W.—4—Di. 7557
Washington Realty Co., Inc.
5320 Ge. Ave., N. W.—11—Ge. 8300
Wright, W. B.
5211 Wis. Ave., N. W.—15—Em. 3380

CHANGES IN TOSTER

Aldon Construction Co.—to—Aldon Properties
625 Woodward Bldg.—5—Na. 5740
Boaz, J. Noble
7424 Wis. Ave. Bethesda, Md.
Wi. 7500
Chas. E. Burr & Gorman P. Young—to—Burr & Young
Tower Bldg.—5—Di. 2328
O. H. Garvin—to—H. Glenn Garvin
Earle Bldg.—4—Ex. 2223

Koones & Co., Chas. C.
Southern Bldg.—5—*Di. 2342*
Wm. W. Mollan—to—Beringer—Mollan—Walker, Inc.
927 15th St., N. W.—5—Ex. 0347
Mount Vernon Mortgage Corp.
1406 M St., N. W.—5—Na. 5536
Moss, George I.
1005 Bonifant St., S. S. Md.—Sh. 2600
Ragsdale, Wm. B.
520 Woodward Bldg.—5—*Ex. 7360*
Seidenspinner, A. H.
6037 Wash. Balto. Blvd. Riverdale, Md. Wa. 1010
Scott, Emma Moore
1510 31st St., N. W.—7—*Dc. 1164*
Walker, Curtis
1917 Eye St., N. W.—6—Na. 3332
Wesley, Ottis, H.
840 Woodward Bldg.—5—Na. 7476
James Morris Woodward & Charles L. Norris to Woodward and Norris
723 20th St., N. W.—Di. 5808
2135 Pa. Ave., N. W.—Re. 2112
Fidelity Mortgage Inv. Co.—to—Fidelity Investment Co.
1105 E St., N. W.—4—Na. 2431

1487 *Government's Exhibit 3.*

WASHINGTON
REAL ESTATE BOARD
"An Association of Realtors"
(Inc. July 19, 1928)

1417 K Street N. W. Washington 5, D. C.

PHONE—NAtional 4494

CONSTITUTION
AND BY-LAWS

Member of the
NATIONAL ASSOCIATION OF
REAL ESTATE BOARDS

Revised to
JULY 22, 1941

1488 "REALTOR"
Its Meaning and Use

DEFINITION AND CONNOTATION

A REALTOR is a "person engaged in the real estate business who is a Board Member or an Individual Member of the National Association of Real Estate Boards, is subject to its rules and regulations, observes its standards of conduct, and is entitled to its benefits." REALTOR is so defined in the Association's Constitution, Article II, Section 5. The Association diligently promotes its proper use as a safeguard for the public in dealing with real estate agents.

The term REALTOR is not a synonym for "real estate agent." It is the distinctive and exclusive designation for those within the membership of the National Association.

The term definitely connotes business competence and high standards of business conduct. Every Realtor has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association, and adopted by his own Board to govern real estate practices of members of the Board, and has manifested that he is of good business character and that he is capable of properly caring for real estate matters entrusted to him.

1489 CONSTITUTION AND BY-LAWS

ARTICLE 1

NAME

The name of this Association shall be: Washington Real Estate Board.

ARTICLE 2

OBJECTS

The objects of this Board are:

First—To bring the Real Estate Brokers of Washington, D. C., together;

Second—To assist in the advancement of the City's interest in general and the real estate business in particular;

Third—To maintain among the brokers of Washington a high standard of business methods and integrity; to foster a spirit of cooperation and of fair and honorable competition;

Fourth—To assure to the public the services of responsible and trustworthy agents and brokers, acting on definite and uniform standards of contracts and charges, with the view of protecting the interests of all parties;

Fifth—To affiliate with and take part in all national matters appertaining to real estate through membership with the National Association of Real Estate Boards;

Sixth—To cooperate with property owners and allied business and professional interests in all matters affecting real estate.

ARTICLE 3

MEMBERSHIP

Membership in this Board shall be divided into two groups: active and associate.

Active

Active membership shall be limited to corporations, partnerships or individuals operating as real estate brokers and

actually engaged in the real estate business in the District of Columbia and that portion of the metropolitan area located in Montgomery and Prince George's Counties, Maryland, provided, however, that any such corporations, partnerships or individuals must have maintained an office and office hours for a period of at least one year immediately preceding the date of application.

Banks, Trust Companies and persons, firms or corporations, whose business is closely allied with real estate shall be eligible for active membership without being established and/or licensed as real estate brokers.

Corporations and partnerships shall only be entitled to one vote, and they shall designate the person authorized to cast the same.

Associate

Associate membership shall be limited to salesmen and other employees who devote their whole time to the real estate business, but only while connected with the office of an active member of this Board.

1490 Associate members shall be eligible for appointment on such committees of the Board as may be designated by the Board of Directors and they shall have the priviege of attending all functions of the Board, except business meetings. However, no associate member shall have the right to vote, hold office or use the term "Realtor."

Method Of Election

Application for membership must be made on a prescribed form which shall be an acceptance of these By-Laws and all other conditions of membership. Every application must be endorsed by at least one active member in good standing and in every case it must be accompanied by dues for the current quarter.

All applications must be referred to the Membership Committee for investigation and report. The name of every applicant for membership shall be posted in the Board's offices and also sent in a general or special notice to every active member before final action is taken. Any member has the right to object to the election of any applicant, which objection when filed with the Executive Secretary shall be considered by the Board of Directors.

The Board of Directors alone shall have the power to elect to membership or decline applications. It shall not, however, consider any application without first having received a report thereon from the Membership Committee.

Article 4

Dues

Annual dues, active members $100.00
Annual dues, associate members ..... $ 5.00

All dues shall become due and payable on October first for the ensuing year but active members may have the privilege of paying such dues in quarterly installments. Dues charged members admitted after October first shall only be charged on a pro rata basis from the first day of the month next following admission to membership.

Article 5

Officers

The officers of this Board shall be President, First Vice-President, Second Vice-President, Executive Secretary and Treasurer, the last two offices to be filled by the same individual

The President, First Vice-President and Second Vice-President shall be elected by the Board from among its active members at its regular annual meeting and shall hold office for the term of one year or until their successors are elected and qualify.

Article 6

Board of Directors

The Board of Directors of this Board shall consist of the President, First Vice-President, Second Vice-President and twelve active members. The President shall be chairman.

The twelve active members of the Board of Directors shall be elected by the Board at its regular annual meeting and shall hold office for the term of two years, providing, however, that at the first annual meeting following the adoption of this by-law the six members receiving the
1491 highest number of votes shall be declared elected for a term of two years and the six members receiving the next highest number of votes shall be declared elected for one year. At each subsequent annual meeting six active members shall be elected to the Board of Directors for two years and no members shall be eligible to serve for more than one two-year term successively.

The Board of Directors shall have immediate charge and control of the affairs of the Board and it shall meet regularly once a month unless otherwise ordered by a vote of the majority of its members. It shall appoint the Executive Secretary and fix his compensation which shall be paid

out of the Board's funds. It shall also have power by majority vote to remove him from office. It shall fill all vacancies in elective offices occurring between annual elections and in individual cases it shall have the power to waive the one year requirement of applicants for active membership when in the judgment of the Board of Directors such action is deemed wise and proper.

Article 7

Executive Committee

There shall be an Executive Committee consisting of the President and four members of the Board of Directors selected by the President. The Executive Committee shall act as a finance committee, committee of ethics, authorize all ordinary disbursements of Board funds and supervise and direct the routine activities of the Board. The Executive Committee shall meet weekly although it can dispense with any meeting when in the judgment of the majority of its members such meeting is unnecessary. It shall make a report to the Board of Directors once a month which report shall contain a statement of the financial condition of the Board progress of the Board's activities as well as a brief statement concerning all matters of importance handled by the committee during the month.

Article 8

Duties of Officers

The President shall be the chief executive and presiding officer of the Board and shall execute on its behalf all instruments requiring formal execution. In the absence or disability of the President, the First Vice-President shall assume and discharge the duties of President; in the absence or disability of both the President and First Vice-President, the Second Vice-President shall assume and discharge the duties of President.

The duties of the Executive Secretary and Treasurer shall be outlined and directed by the Board of Directors. He shall receive, keep and disburse under the order of the Board of Directors all funds of the Board including the funds of the Appraisal Committee. He shall furnish a bond in a responsible surety company in such an amount as may be determined by the Board of Directors. He shall devote his entire time to the Board's work and be responsible to the Board of Directors.

In addition to the duties ordinarily attached to this office, the Executive Secretary shall also be the Executive Officer

in charge of the Board's offices and records; and shall countersign all instruments of the Board requiring formal execution.

In the absence of the Treasurer, the President or either Vice-President shall have authority to sign checks for disbursements approved by the Board of Directors.

All the foregoing officers shall perform such other
1492 duties as devolve upon like officers of similar organizations, and they shall make to the Board at its annual meeting, and oftener if required, and to the Board of Directors, a full report of matters pertaining to their respective offices.

Article 9

Nominating Committee

There shall be a Nominating Committee consisting of five active members of the Board, none of whom shall be officers of the Board or members of the Board of Directors or the Appraisal Committee, this restriction not to apply to past presidents. This committee shall be appointed by the Board of Directors on or before the first day of September of each year. It shall be the duty of the Nominating Committee to nominate at least one person for each elective office of the Board which nominations shall be reported to the Board at its annual meeting. The Secretary shall mail to the active membership of the Board at least ten days prior to the annual meeting a special notice containing the nominations made by this committee.

Article 10

Election of Officers and Directors

The annual election of officers and six members of the Board of Directors shall take place at the annual meeting of the Board to be held on the last Monday of September or any other date in the last week of September as determined by the Board of Directors.

The report of the Nominating Committee shall be submitted to the membership at the annual meeting and additional nominations may be made from the floor by active members.

The election shall be by ballot and every active member in good standing present at the meeting shall be entitled to vote.

The President shall appoint three tellers who shall make a tabulation of the ballots and report to the meeting the result of the votes cast. In the event that there is more than one nominee for either of the offices of President, First

Vice-President, or Second Vice-President, the member receiving the highest number of votes for each of these offices shall be declared duly elected. The six members receiving the highest number of votes for the Board of Directors shall be declared elected. Any tie vote shall be decided by lot.

Article 11

Appraisal Committee

The Appraisal Committee of the Board shall consist of seven active members to be appointed annually by the Board of Directors from among the active membership of the Board. No member, however, shall be eligible to serve on the Appraisal Committee for a longer period than three successive years. The Appraisal Committee shall elect a chairman and vice-chairman each year from among its members. The Executive Secretary shall act as Secretary of the Appraisal Committee and he shall keep a complete record of all appraisals made as well as a complete set of minutes of all meetings of the Committee.

This committee shall have the power and authority to act for and in the name of the Board in all matters pertaining to appraisals of real estate, except as to the elimination or modification of fees, and may in its discretion decline to make appraisals.

1493 The fee to be charged for each certificate shall be based on the value of the property appraised at the rate of $1.00 per $1,000.00 up to $50,000.00, and 50 cents additional for each $1,000 over $50,000.00. Minimum fee $25.00.

One-half of all fees received for appraisals shall be retained by the Board and the remaining one-half shall be equally divided between the members of the Appraisal Committee who actually participated in the appraisal.

No variation shall be made in the above schedule of charges or in the division of fees collected without authority of the Board of Directors of the Executive Committee.

The Committee shall not appraise any property unless requested or authorized by the owner, his agent, or holder of collateral or monetary interest therein.

The records, minutes and all information pertaining to appraisals shall be held strictly confidential and in no case given or exhibited to anyone other than the party requesting the appraisal or the members of the Committee who actually participated in it.

No member of the Appraisal Committee shall sit in any meeting of the Committee nor participate in any manner in the appraisal of any property in which such member has any interest directly or indirectly as owner, agent, or otherwise.

Any member who repeatedly absents himself from the meetings of the Committee without satisfactory explanation shall be requested by the chairman to resign his membership on the Committee.

In order that the Committee may have full information relative to the property to be appraised, it may in its discretion invite the owner, the agent, the applicant for the appraisal, or any member of the Board to appear before it.

The Appraisal Committee shall make a complete personal investigation of the property to be appraised. However, where the valuation is less than $25,000.00 the Chairman may appoint a sub-committee of not less than three members to personally inspect the property, submitting its report to the entire committee for consideration. After inspection the valuation shall be determined by the Committee in a formal meeting.

No member shall participate in the appraisal of any property nor in the division of any fee collected therefor without actually having first made a complete personal inspection, except as provided where the property is valued at $25,000.00 or less.

The chairman shall certify in writing to the Executive Secretary the valuation agreed upon and this original certificate shall also be signed by every member of the Committee who participated in the appraisal. This original certificate when properly signed shall be authority for the issuance of the formal certificate of the Board, which certificate shall bear the signature of the President, Executive Secretary, and the Chairman of the Appraisal Committee, the attesting signatures of the officers of the Board certifying only as to the authenticity of the certificate.

The Board of Directors at its first meeting each year shall designate four members to be known as associate assistants, at least two of such assistants to be selected from the associate membership, two of the members to serve the first six months and two to serve the last six months of the fiscal year or until their successors are designated and
1494 qualify. These associate assistants will have no vote in the Committee nor shall they participate in the distribution of appraisal fees

The official appraisal certificate of the Board shall include the following:

a. It is assumed that the description of the premises and income features of the property as submitted by the applicant is correct and that the property is subject only to such restrictions, easements and encumbrances as have been disclosed by the applicant. No investigation of the title or survey has been made and therefore no responsibility is assumed as to the correctness of such information by the Washington Real Estate Board.

b. The appraisal represents the opinion of the Committee under the conditions of a buyer being desirous of buying, ready to purchase and able to pay cash or equivalent but under no pressure to do so and an owner being desirous of selling and ready to sell but under no compulsion to do so.

c. The appraisal is as of the date of the certificate unless otherwise stated.

d. In event the appraisal issued is for a fractional part of the property, it is understood that the value reported is invalidated if used in making a summation appraisal of the property as a whole.

e. The attesting signature of the officers of the Board certify only as to the authenticity of the certificate.

f. The employment of the Appraisal Committee is fulfilled by the Washington Real Estate Board and its members upon delivery by it of the certificate duly executed.

Article 12

Arbitration Committee

The Board of Directors shall appoint a committee of five active members to be known as the Arbitration Committee, and it shall also appoint three active members as alternates to serve on this committee when necessary. This Committee shall hear and decide all matters of controversy between members and its decision shall be binding on the members involved.

It shall be the duty of all active members to refer to this Committee all matters of controversy with other active members arising out of real estate transactions. Charges may be filed with the Board of Directors against any member who refuses to submit to arbitration any matter which should properly be heard by the Arbitration Committee.

In answering such charges the member will have to show the Board of Directors a good and sufficient reason for his failure to submit to arbitration or be subject to its action as provided for in Article 13.

Failure to comply with the decision of the Arbitration Committee within fifteen days after the transaction in question has been fully consummated, shall be considered a violation of the rules of the Board and shall subject the member to the action of the Board of Directors as provided for in Article 13.

Complaints to be heard by the Arbitration Committee must be filed with the Executive Secretary in written form and must contain a statement of the facts on which
1495 the complaint is based. Upon receipt of the complaint the Executive Secretary shall within fifteen days arrange a meeting of the Arbitration Committee and notify in writing all parties to the controversy of the date and hour.

Before proceeding with the hearing of any matter each member who is a party to the controversy shall sign a written statement agreeing to abide by the decision of the Committee.

The complaining member shall first make a statement of the facts upon which he bases his complaint. The other member shall then be allowed to answer the complaint. Both parties shall have the privilege of introducing such testimony or evidence as is pertinent to the question and both shall be allowed to have witnesses testify as to any fact pertaining to the subject matter.

After hearing the testimony, the Arbitration Committee shall go into executive session and consider the matter, rendering its verdict on the basis of honest and fair dealing, which decision shall be binding on the members involved.

The decision of the Arbitration Committee shall be communicated in writing by the Executive Secretary to the parties in interest.

Article 13

Membership Forfeiture

Any member whose current dues are not paid within nine months after they become due may be dropped by majority vote of the Board of Directors; however, the Board of Directors may in its discretion accept the resignation of any such member upon payment of the dues accrued to the first day of the month following the date of resignation.

The Board of Directors, upon complaint or on its own initiative, by majority vote may censure, suspend or expel any member for conduct which in its opinion is subversive to the purpose and scope of this Board, provided, however, that any such member shall be given an opportunity to appear before the Board of Directors to answer the complaint.

ARTICLE 14

RULES

The Board by a majority vote at any regular or special meeting may adopt specific rules of practice or ethics and any such rules when adopted automatically become part of these By-Laws and are binding alike on every member, provided, however, that every member shall be mailed a written notice at least ten days before the meeting, which notice shall contain the complete substance of the proposed rule.

ARTICLE 15

QUORUM

Twenty active members shall constitute a quorum at any regular or special meeting of the Board and a majority of any committee shall constitute a quorum thereof. A less number can only adjourn.

ARTICLE 16

NOTICES

Every member shall furnish the Executive Secretary with his office address and any notice mailed to such address shall be deemed service upon the member as of the date of mailing the same in the Post Office at Washington.

ARTICLE 17

AMENDMENTS

Any article may be repealed or amended at any
1496 general or special meeting of the Board upon two-thirds vote of those present, provided a written notice was mailed to every active member at least ten days prior to the meeting, which notice shall contain the substance of the proposed repeal or amendment.

ARTICLE 18

MEETINGS

Meetings of the Board shall be held only upon call of the President or Board of Directors.

Article 19

Committees

Major Committees

The Board of Directors shall appoint the following major committees, consisting of five active members each, naming the chairman thereof, to serve in connection with all matters pertaining to the respective branches of the real estate business as indicated by the title of the committees: Property Management, Brokers, Mortgage and Finance and Business Property Leasing.

These committees shall investigate, study and handle all matters referred to them by the Board of Directors or the Executive Committee and they may, in their respective fields, initiate activities, policies and plans for the betterment of the members of the Board, and the chairman of each committee shall report direct to the Board of Directors. Members of the Board shall not be bound by any action of these committees in respect to any change in the Constitution and By-Laws, Code of Ethics, schedule of commissions, rules of practice and/or established policies of the Board unless such change is submitted to the Board by the Board of Directors and voted on in accordance with Article 17.

Standing Committees

The Board of Directors shall appoint the following standing committees, consisting of from three to five active members and such associate members as it may designate, and it shall also name the chairman.

Membership Committee

This Committee shall investigate all applications for membership and report to the Board of Directors its recommendations. It shall also devise means of obtaining new members when in the opinion of the Board of Directors that is desirable.

Zoning Committee

This Committee shall keep in touch with and study all matters pertaining to zoning and represent the Board in hearings before the Zoning Commission.

Legislation and Taxation Committee

This Committee shall study all proposed legislation affecting real estate or taxation in the District of Columbia and shall represent the Board in such matters before the Congress and the Commissioners.

Public Affairs Committee

This Committee shall carefully investigate all matters relative to the sale of property to undesirable purchasers as well as other matters of public character that may be referred to it by the Board of Directors.

Reception Committee

This Committee shall act as a reception committee and assist in handling the arrangements of all functions of the Board.

Special Committees

The Board of Directors shall appoint such special committees from time to time as it shall deem wise or necessary in conducting the affairs of the Board.

1497 Services of the Washington Real Estate Board Available to its Members

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Baist's Plat Books of the District of Columbia. Four volumes, all the most recent editions.

Plats of Subdivisions since 1929.

Assessment Book Service.

Klinge's plats of Montgomery County, Maryland.

Franklin Survey Company plats of Arlington County, Virginia.

Franklin Survey Company plats of Prince George's County, Md.

Zoning Maps of Washington and Metropolitan Area.

D. C. Zoning Changes—notification prior to and following all hearings.

Ownership Record—a complete card file showing the record ownership of all lots and parcels within the District of Columbia, posted within 48 hours of recordation of instruments. Cards filed by lot and square.

Apartment House File—record of owner, location and agent.

Right to use standard forms and new copyrighted Apartment Rental Agreement.

Building Permits covering all dwellings, apartments and flats—shown by street address and giving pertinent information on builder, costs, etc.

Statistical data covering deeds recorded, deeds of trust and foreclosures, and sources of funds.

Library of special works on all phases of Real Estate Business.

Services of National Association of Real Estate Boards; Divisional activities; special bulletins; Appraisal and Management Journals.

License to Active Members for use of designation "REALTOR."

Weekly Letter on Real Estate—"HEADLINES."

Monthly Bulletin—Real Estate Board News.

Special consultation service to aid members in solving problems pertaining to their business, service of standing and special committees; and cooperative effort to stabilize practices through standardization and study.

Information on any phase of real estate practice furnished either in person or by telephone—NATIONAL 4494—4495.

1498 *Government's Exhibit 4*

WASHINGTON REAL ESTATE BOARD, INC.
An Association of Realtors

OFFICERS

CHARLES H. HILLEGEIST
President
F. MORAN MCCONIHE
1st Vice-President
RAYMOND M. TAYLOR
2nd Vice-President
CHAS. J. RUSH
Executive Secretary-Treasurer

BOARD OF DIRECTORS

J. GARRETT BEITZELL
LEWIS T. BREUNINGER
E. F. COLBERT
S. DOLAN DONOHUE
CHARLES H. HILLEGEIST
EDWARD K. JONES
WM. L. LEBLING
F. MORAN MCCONIHE
S. MILES MONTGOMERY
WM. L. OREM, JR.
THOMAS W. SANDOZ
J. HAWLEY SMITH
RAYMOND M. TAYLOR
DEVERE R. WEEDON
CAREY WINSTON

1417 K STREET, NORTHWEST
WASHINGTON 5, D. C.
Telephone NAtional 4494

OFFICERS AND DIRECTORS

1940-1941

President—Waverly Taylor
1st Vice-President—Wm. J. Flather, Jr.
2nd Vice-President—Chas. C. Koones
Executive Sec.-Treas.—Chas. J. Rush

B. L. Colton
S. Dolan Donohoe
Frank M. Doyle
Wm. J. Flather, Jr.
Harvey L. Jones
William L. King
Chas. C. Koones
Thos. D. Lewis
Francis A. Murray
Thornton W. Owen
Frank S. Phillips
Herbert W. Primm
Waverly Taylor
Fred A. Smith
Wm. M. Throckmorton

1941-1942

President—Chas. C. Koones
1st Vice-President—Claud Livingston
2nd Vice-President—Homer Phillips
Executive Sec.-Treas.—Chas. J. Rush

J. Garrett Beitzell	Chas. C. Koones
Frank Bell	Claud Livingston
Lewis T. Breuninger	Thorton W. Owen
B. L. Colton	Homer Phillips
S. Dolan Donohoe	Fred A. Smith
Harvey L. Jones	Waverly Taylor
David B. Karrick	Wm. M. Throckmorton

Albert W. Walker

1942-1943

President—Claud Livingston
1st Vice-President—Homer Phillips
2nd Vice-President—Lewis T. Breuninger
Executive Sec.-Treas.—Chas. J. Rush

J. Garrett Beitzell	David B. Karrick
Frank Bell	Charles C. Koones
J. McKenney Berry	Claud Livingston
Lewis T. Breuninger	F. Moran McConihe
Charles H. Hillegeist	Homer Phillips
Owen Hohenstein	F. Wallace Stoever
Karl E. Jarrell	Waverly Taylor

Albert W. Walker

1499 1943-1944

President—Homer Phillips
1st Vice-President—Lewis T. Breuninger
2nd Vice-President—S. Dolan Donohoe
Executive Sec.-Treas.—Chas. J. Rush

G. Edward Altemus	C. H. Hillegeist
J. McKenney Berry	Karl E. Jarrell
Lewis T. Breuninger	Chas. C. Koones
Edward R. Carr	Claud Livingston
E. H. Croxton	F. Moran McConihe
S. Dolan Donohoe	Homer Phillips
Paul O. Drury	F. Wallace Stoever

Oliver M. Walker

1944-1945

President—Lewis T. Breuninger
1st Vice-President—S. Dolan Donohoe
2nd Vice-President—Charles H. Hillegeist
Executive Sec.-Treas.—Chas. J. Rush

G. Edward Altemus	C. H. Hillegeist
Lewis T. Breuninger	Clarence E. Kefauver
Edward R. Carr	Claud Livingston
W. O. Cooley	Charles L. Norris
E. H. Croxton	W. Hiles Pardoe
S. Dolon Donohoe	Homer Phillips
Paul O. Drury	Raymond M. Taylor

Oliver M. Walker

1945-1946

President—S. Dolan Donohoe
1st Vice-President—Charles H. Hillegeist
2nd Vice-President—F. Moran McConihe
Executive Sec.-Treas.—Chas. J. Rush

Lewis T. Breuninger	Charles L. Norris
L. F. Colbert	F. Moran McConihe
Wm. O. Cooley	Wm. L. Orem, Jr.
S. Dolan Donohoe	W. Hiles Pardoe
C. H. Hillegeist	Homer Phillips
Clarence E. Kefauver	J. Hawley Smith
Wm. L. Lebling	Raymond M. Taylor

Carey Winston

1946-1947

President—Charles H. Hillegeist
1st Vice-President—M. Moran McConihe
2nd Vice-President—Raymond M. Taylor
Executive Sec.-Treas.—Chas. J. Rush

J. Garrett Beitzell	S. Miles Montgomery
Lewis T. Breuninger	F. Moran McConihe
Lewis F. Colbert	Wm. L. Orem, Jr.
S. Dolan Donohoe	Thomas W. Sandoz
C. H. Hillegeist	J. Hawley Smith
Edward K. Jones	Raymond M. Taylor
Wm. L. Lebling	DeVere R. Weedon

Carey Winston

1500 *Government's Exhibit 5*

WASHINGTON REAL ESTATE BOARD INC.
"AN ASSOCIATION OF REALTORS"

CODE OF ETHICS

In order to maintain the dignity and professional character of the real estate business, and to promote fair and honorable competition between brokers, the Washington Real Estate Board has adopted this Code of Ethics as the basis of fair and ethical practice.

(Adopted Sept. 14, 1922)
(Amended Dec. 12, 1934.)

1417 K Street, N. W.
WASHINGTON, D. C.

4/30/43

1501

Section 1

ADVICE AND INFORMATION

1. A client is entitled to receive and should expect from his broker, competent advice and full information relative to matters entrusted to him.

2. Always recommend complete examination of titles in real estate transfers.

3. Never give off-hand valuations. Should an individual appraisal be made, give it the necessary time and study, and charge a fee for the service.

4. Always advise exclusive listings.

5. At or before the conclusion of negotiations, in any real estate transaction the principals interested therein should be fully informed by the broker as to commissions, expenses, charges and adjustments for which they may respectively be liable.

Section 2

LISTINGS

1. Exclusive listings should not be accepted unless the broker is qualified and equipped to handle the property and when accepted, the broker is obligated to make special efforts to effect a sale or lease as the case may be.

2. Owners when listing properties for sale or lease should be frankly advised by the broker if the asking price is too high or to low.

3. All listed properties should be personally inspected before being offered.

4. Listings between brokers should be in writing and dated.

5. When a broker who had accepted a listing from another broker subsequently receives the same listing direct from the owner without solicitation, he shall not be obligated to further recognize the original broker, but must, however, notify him in writing to that effect.

6. Any offer secured by broker "B" on property previously listed with him by broker "A" must in every case be submitted through the office of broker "A" and under no circumstances submitted direct to the owner without first having received permission of broker "A".

7. Broker "B" has no right to promiscuously relay to other brokers any listing received from broker "A".

1502 Section 3

COMMISSIONS

1. Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates.

2. Commissions should be divided only with established and or licensed real estate brokers.

3. Unless agreed in advance brokers when acting themselves as purchaser or tenant should not expect or accept any commission in such transactions and should pay the full board rates of commission when acting as seller, borrower or lessor.

4. Commissions should not be accepted from both parties without their knowledge and consent.

5. Brokers should not acept commission on cost of repairs or other expenses in connection with properties under their control without the knowledge and consent of the owner.

6. Agreement as to division of commissions between brokers acting jointly should be made in writing. Unless special arrangement to the contrary is made prior to the consummation of the transaction the commission should be divided in accordance with the official schedule of commissions adopted by the Board.

Section 4

SIGNS

1. No member shall place a sign on any property offering it for sale or for rent without the written consent of the owner or his authorized agent.

2. A broker should never place more than one of his [illegible] on any one piece of property.

3. No one piece of property should ever have more than three different brokers' signs displayed at the same time.

4. No broker should ever remove the sign of another broker unless directed to do so by the owner, in which event he should notify in writing the broker whose sign he has removed.

5. A broker should not disregard the sign of another broker and for the purpose indicated by the sign should deal through that broker, provided that such sign was the means which first called his attention to the fact that the property was on the market.

1503 Section 5

GENERAL

1. All reasonable offers made in writing and accompanied by a deposit should be immediately submitted to the owner. Offers received from other brokers should not be held up.

2. Brokers should willingly cooperate with an exclusive agent and should never threaten to divert a prospective purchaser because an exclusive agency exists, nor in any other manner attempt to defeat the rights of the exclusive agent.

3. No member shall offer real property for sale or for lease on any terms without the full knowledge and consent of the owner or his authorized agent.

4. As between two brokers claiming commission on a real estate transaction, in the absence of any special agreement to the contrary, the broker who by fair and open methods actually obtained the contract and deposit shall be the one entitled to the commission.

5. No member shall attempt or endeavor to negotiate the sale, exchange or lease of any real property directly with an owner or lessor if he knows that such owner or lessor has a written outstanding contract granting exclusive agency in connection with such property with another member.

6. No member shall advertise property for which he is agent (whether by circular, radio, display, so-called "blind" or "box number" ads, or by any other means) in such manner as may be misleading or inaccurate in any material particular, or in any way misrepresent any properties, terms, values, policies, services of the business conducted, or create the impression that the advertiser is the bona fide owner.

7. No member shall give, or permit to be given, or directly offer to give anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party.

8. No member shall guarantee, authorize or permit any person to guarantee future profits which may result from the resale of real property.

9. No member shall induce any party to a contract of sale or lease to break such contract for the purpose of substituting in lieu thereof a new contract with another principal.

1504 10. A broker should not employ part time salesmen.

11. A broker should never sell his own property to a client nor purchase property for himself from his client without informing the client of that fact in either case.

12. Brokers should willingly cooperate with each other.

13. All contracts should be in writing and should specifically express all the terms and agreements.

14. No broker should unjustly criticize or condemn a fellow broker.

15. No property in a white section should ever be sold, rented, advertised, or offered to colored people. In a doubtful case advice from the Public Affairs Committee should be obtained.

16. Members shall not solicit property owners by letter or otherwise in connection with maturing loans of an amount less than $25,000.00 nor distribute to them any printed or written matter in reference to making mortgage loans when other members either hold such maturing loans or represent the holders thereof.

17. No member shall rebate or refund any rent to any tenant unless such rebate or refund is specifically incorporated in the original lease or rental contract. No free rent for any period shall be granted any tenant by any member unless such free rent is completely described in the written lease or rental agreement.

18. No member shall knowingly withhold from or insert in any statement of account or invoice any statement that makes it inaccurate in any material particular.

19. Requests for delivery of leases, rental contracts and other papers pertaining to property, when made by an

owner or an accredited agent should be promptly complied with if the owner is rightfully entitled to the possession of such papers.

20. Brokers should promptly remit and account for all funds collected or ~~handled by them~~ for others. Trust funds should be reserved separate and apart from personal funds of the broker.

21. No member shall accept employment or compensation for appraising real property contingent upon the reporting of a predetermined or specified valuation.

22. No member shall give or offer to give any prospect for the purchase of real property free or for a nominal consideration any real property, or any personal property having more than nominal value, or a voice or vote in any scheme or game of chance.

1505 WASHINGTON
REAL ESTATE BOARD
"An Association of Realtors"
(Inc. July 19, 1928)
1417 K Street N. W. Washington, D. C.

1506 *Government's Exhibit 6.*

CODE OF ETHICS

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS

Preamble

UNDER all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of the institutions and of our civilization. The Realtor is the instrumentality through which the land resource of the nation reaches its highest use and through which land ownership attains its widest distribution. He is a creator of homes, a builder of cities, a developer of industries and productive farms.

Such functions impose obligations beyond those of ordinary commerce; they impose grave social responsibility and a patriotic duty to which the Realtor should dedicate himself, and for which he should be diligent in preparing himself. The Realtor, therefore, is zealous to maintain and improve the standards of his calling and shares with his fellow-Realtors a common responsibility for its integrity and honor.

In the interpretation of his obligations, he can take no safer guide than that which has been handed down through twenty centuries, embodied in the Golden Rule:

"Whatsoever ye would that men should do unto you, do ye also unto them."

Accepting this standard as his own, every Realtor pledges himself to observe its spirit in all his dealings and to conduct his business in accordance with the following Code of Ethics adopted by the National Association of Real Estate Boards:

Part I.

Professional Relations

ARTICLE 1.

In the best interest of society, of his associates, and of his own business, the Realtor should be loyal to the real estate board of his community and active in its work; and he should willingly share with his fellow-members the lessons of his experience.

ARTICLE 2.

The Realtor should so conduct his business as to avoid controversies with his fellow-Realtors; but in the event of a controversy between Realtors who are members of the same real estate board, such controversy should be submitted for arbitration in accordance with the regulations of their board and not to a suit at law, and the decision in such arbitrations should be accepted as final and binding.

ARTICLE 3.

Controversies between Realtors who are not members of the same real estate board should be submitted for arbitration to an arbitration board consisting of one arbitrator chosen by each Realtor from a real estate board to which he belongs and of one other member, or a sufficient number of members to make an odd number, selected by the arbitrators thus chosen.

ARTICLE 4.

When a Realtor is charged with unethical practice, he should voluntarily place all pertinent facts before the proper tribunal of the real estate board of which he is a member, for investigation and judgment.

ARTICLE 5.

A Realtor should never publicly criticize a competitor; he should never express an opinion of a competitor's transaction unless requested to do so by one of the principals, and his opinion then should be rendered in accordance with strict professional courtesy and integrity.

ARTICLE 6.

A Realtor should never seek information about a competitor's transaction to use for the purpose of closing the transaction himself or diverting the customer to another property.

ARTICLE 7.

When a Realtor accepts a listing from another broker, the agency of the broker who offers the listing should be respected until it has expired and the property has come to the attention of the accepting Realtor from a different source, or until the owner, without solicitation, offers to list with the accepting Realtor; furthermore, such a listing should not be passed on to a third broker without the consent of the listing broker.

ARTICLE 8.

Negotiations concerning property which is listed with one Realtor exclusively should be carried on with the listing broker, not with the owner.

ARTICLE 9.

The schedules of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor.

ARTICLE 10.

A Realtor should not solicit the services of any employee in the organization of a fellow-Realtor without the knowledge of the employer.

ARTICLE 11.

No sign should ever be placed on any property by a Realtor without the consent of the owner.

Part II

Relations to Clients

ARTICLE 12.

In justice to those who place their interests in his hands, the Realtor should endeavor always to be informed regarding the law, proposed legislation, and other essential facts and public policies which affect those interests.

1507 ARTICLE 13.

In accepting the agency for property, the Realtor pledges himself to be fair to purchaser or tenant, as well as to the owner whom he represents and whose interests he should protect and promote as he would his own.

ARTICLE 14.

A Realtor should not buy for himself property listed with him, nor should he acquire any interest therein, without first making his true position clearly known to the listing owner.

ARTICLE 15.

When asked for an appraisal of real property or an opinion on a real estate problem, the Realtor should never give an unconsidered answer; his counsel constitutes a professional service which he should render in writing over his signature and only after having ascertained and weighed the facts, for which he should make a fair charge. The Realtor should not undertake to give an appraisal on any property in which he is in any way interested whatsoever, unless such interest is specifically disclosed in the appraisal report, and under no circumstances should he undertake to give an appraisal or opinion when his employment is contingent upon the amount of his appraisal or the character of his opinion.

ARTICLE 16.

The Realtor should encourage the naming of the actual or an obviously nominal consideration in a deed.

ARTICLE 17.

When acting as agent in the management of property, a Realtor should not accept any commission, rebate, or profit on expenditures made for the owner, without his full knowledge and consent.

ARTICLE 18.

The exclusive listing of property should be urged and practiced by a Realtor as a means of eliminating misunderstanding and dissensions and assuring better service to the owner.

ARTICLE 19.

The acceptance by a Realtor of an exclusive listing imposes the obligation of rendering skilled and conscientious service; when a Realtor is unable to render such services either himself or with the aid of his fellow-Realtors, he should not accept the listing.

ARTICLE 20.

Before offering a property listed with him by the owner, it is the Realtor's duty to advise the owner honestly and intelligently regarding its fair market value.

Part III.

Relations to Customers and the Public

ARTICLE 21.

It is the duty of every Realtor to protect the public against fraud, misrepresentation, or unethical practices in connection with real estate transactions.

ARTICLE 22.

Property should be offered by a Realtor solely on its merit without exaggeration, concealment, or any form of deception or misleading representation.

ARTICLE 23.

It is the duty of a Realtor to ascertain all pertinent facts concerning every property for which he accepts the agency, so that in offering the property he may avoid error, exaggeration, and misrepresentation.

ARTICLE 24.

A Realtor should never offer a property without the authorization of the owner.

ARTICLE 25.

The price at which a Realtor offers a property should not be higher than that which the owner has openly agreed to take.

ARTICLE 26.

Before a Realtor buys for a client property in the ownership of which the Realtor has an interest he should disclose his interest to all parties to the transaction.

ARTICLE 27.

Before a Realtor sells property in the ownership of which he is interested, he should make it clear to the purchaser that he is acting solely for the owner.

ARTICLE 28.

A Realtor when acting as a broker should make it clear for which party he is acting, and he should not receive compensation from more than one party except with the full knowledge and consent of all parties to the transaction.

ARTICLE 29.

Under no circumstances should a Realtor permit any property in his charge to be used for illegal or immoral purposes.

ARTICLE 30.
In closing transactions, the Realtor should advise the use of legal counsel when the interest of any party to the transaction appears to require it; and in all cases he should exercise care in the preparation of documents so that they shall embody the exact agreements reached.

ARTICLE 31.
At the time the agreement is reached as to the terms of a transaction the Realtor should fully inform each party regarding commissions and other expenses to which each is respectively liable.

ARTICLE 32.
Before the closing of a transaction, the Realtor should recommend the examination of title and conveyancing papers.

ARTICLE 33.
All contracts and agreements to which a Realtor is a party should be made in writing and should be complete and exact.

ARTICLE 34.
A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood.

ARTICLE 35.
No instructions nor inducements from any client or customer relieve the Realtor from his responsibility strictly to observe this Code of Ethics.

1508 *Government's Exhibit 7*

CONSTITUTION
and
BY-LAWS

NATIONAL ASSOCIATION
OF REAL ESTATE BOARDS
REALTORS
ARE ACTIVE
MEMBERS OF
CONSTITUENT
BOARDS

NATIONAL ASSOCIATION
OF REAL ESTATE BOARDS
22 WEST MONROE STREET
CHICAGO, ILL

1509

Constitution and By-Laws of the National Association of Real Estate Boards

Incorporated Under
the Laws of the State of Illinois
July 2, 1908

This Constitution was adopted at San Francisco, California, May 31, 1922, and revised by the National Convention at Washington, D. C., on June 6, 1924; at Detroit, Mich., June 26, 1925; by the Annual Meeting at Miami, Fla., January 13, 1927; by the National Convention at Seattle, Wash., August 13, 1927; by the Annual Meeting at Houston, Texas, January 25, 1928; by the National Convention at Louisville, Ky., June 22, 1928; by the Annual Convention at Boston, Mass., June 28, 1929; by the Annual Convention at Chicago, Ill., June 16, 1933; by the Annual Meeting at Coral Gables, Florida, January 19, 1934; by the Annual Convention at Minneapolis, Minn., June 29, 1934; by the Annual Meeting at Houston, Texas, January 25, 1935; by the Annual Convention at Atlantic City, N. J., October 25, 1935; by the Annual Convention at Milwaukee, Wis., November 12, 1938, by the Annual Convention at Los Angeles, Cal., October 27, 1939, by the Annual Realtors' War Conference at St. Louis, Mo., November 20, 1942, and by the Annual Realtors' War Conference at Cleveland, Ohio, November 19, 1943.

Corrected to May 15, 1945

1510

Constitution

Article I

Name

The name of the organization shall be: National Association of Real Estate Boards.

Article II

Objects

The objects of the National Association shall be:

Section 1: To unite those engaged in the recognized branches of the real estate business, including brokerage, management, mortgage financing, appraising, and land development and home building, and owners of real estate, in the United States of America, The Territory of Alaska, the Territory of Hawaii, the insular possessions of the United States, the Philippine Islands, Canada, Mexico and Cuba, for the purpose of exerting effectively a combined influence upon matters affecting real estate interest;

Sec. 2. To enable its members to transact their business to better advantage than heretofore, by the adoption of such rules and regulations as they may deem proper;

Sec. 3. To promote and maintain high standards of conduct in the transaction of the real estate business;

Sec. 4. To formulate and enforce a code of ethics for the members of the National Association;

Sec. 5. To license its members the right to use the term or symbol "Realtor" which is hereby defined as designating a person engaged in the real estate business who is a Board Member or Individual Member of the National Association of Real Estate Boards, is subject to its rules and regulations, observes its standards of conduct, and is entitled to its benefits; and

Sec. 6. To protect the public against unethical, improper or fraudulent practices by the affixing of the term or symbol "Realtor" to advertising matter, stationery, signboards, stock certificates, bonds, mortgages, and other instruments or other material used by or in connection with the real estate business, so as to educate the general
1511 public to deal only with those persons who have agreed to observe the standards maintained by the National Association.

Article III

Membership

Section 1. (A) The Members of the National Association shall consist of four classes: (1) Member Boards, (2) Board Members, (3) Individual Members, and (4) Property Owner Members.

(B) Member Boards shall consist of local real estate boards which shall include city, county, or inter-county boards and State or Provincial Associations of real estate boards as provided in Section 4.

(C) Board Members shall consist of active members in good standing of any Member Boards as hereinbefore defined.

(D) Individual Members shall be such persons as are elected to direct membership under the provisions of Section 5 of this Article.

(E) Property Owner Members shall be such owners of real property as are, or become, affiliated with Member Boards if resident in a community where there is a Member Board, and owners of real property in territory where there is no Member Board.

Sec. 2. Only one board from any city shall be elected a Member Board of the National Association, except as is provided in Section 3.

Section 3. Whenever a city with a population of more than 500,000 consists of two or more political subdivisions representing distinct communities or includes territory which was a separate city prior to consolidation or annexation, there may, in the discretion of the Board of Directors be elected to membership a board as a Member Board from each of such political subdivisions or from the territory of any such prior separate city. At the time of election the Board of Directors shall define the territorial jurisdiction of such Board.

Sixty days' notice of, and opportunity for a hearing on, the application of any such Board for membership shall be given the Member Board or Boards of such city prior to the election of such Board by the Board of Directors, unless such notice and hearing are waived in writing by the Member Board or Boards.

1512 Sec. 4. (A) State and Provincial Associations having membership agreements with the National Association as provided in Article XIV, Section 2, of this Constitution may be elected to membership in the National Association in order to integrate more closely the work of local, State and National bodies, to further the purposes contemplated by Article XIV, Section 2, of this Constitution, and also to afford an opportunity for individuals engaged in the real estate business in unorganized or unassigned territory to become members of the National Association, subject to its standards, and to be represented in the National Association.

(B) Such State and Provincial Associations shall be elected to membership only upon the following conditions:

1. Only one State or Provincial Association shall be elected from a given State or Province.
2. Such State or Provincial Association so elected may accept for direct membership in such association individuals in territory which is not within the jurisdiction of any local real estate board holding membership in the State and National Associations, but shall not accept such Individual Members not in any such territory.
3. Any State or Provincial Association so electing individuals agrees to be responsible for the enforcement of the Code of Ethics of the National Association with respect to such individuals.

4. Such State or Provincial Association shall have the same right to control the use of the term "Realtor" in such unorganized territory as any local board has in organized territory.
5. Any such State or Provincial Association electing individuals agrees to pay dues for them in the same manner as a local real estate board pays for its active members.
6. Wherever the terms "Member Board" or "real estate board" are used in this Constitution or the By-laws of the National Association, they shall be held to include State or Provincial Associations elected under the terms of this section, and said State or Provincial Associations shall be held to be "Member Boards."

1513 (C) Any such State or Provincial Association so elected shall be entitled to one vote as such and to additional votes for each Individual Member upon the same basis as local boards for their Board Members under the provisions of Article VIII of this Constitution.

Sec. 5. In cities, towns, and counties in States where there is no State or Provincial Association having membership agreement with the National Association, as provided in Article III, Section 4, of this Constitution, and where there is no organized recognized Real Estate Board, or which have not been designated as within the territorial jurisdiction of any such organized recognized Real Estate Board by the Board of Directors of the National Association, said Board of Directors may by majority vote, elect Individuals engaged in the real estate business or otherwise eligible for membership in Member Boards, as Individual Members. In the case of each application the nearest Member Board shall be consulted. The rights, privileges, and obligations of such Individual Members, shall be the same as those of Board Members, each such Individual Member being a delegate to any meeting of the National Association and entitled to one vote but in the event of the subsequent admission to membership of a local Real Estate Board or State Association as a Member Board, such Individual Member shall thereafter be entitled to membership only by virtue of membership in such Member Board.

Article IV

Board of Directors

Section 1. The government of the National Association shall be vested in a Board of Directors composed of the following:

(A) The President and Treasurer ex-officio.

(B) The former Presidents who continue to be affiliated with their local boards.

(C) Thirty Directors at Large, ten of whom shall be elected each year to serve for a term of three years or until their successors are duly elected and qualified, provided, however, that no Director shall serve more than two successive elected terms.

(D) The Presidents of State or Provincial As-1514 sociations having membership agreements with the National Association under the provisions of Article XIV, Section 2.

(E) Vice Presidents ex-officio.

(F) The Chairmen of Divisions, Institutes, and Councils ex-officio.

Sec. 2. Fifteen Directors shall constitute a quorum.

Sec. 3. Any Director who shall be absent from three consecutive regular meetings of the Board of Directors shall automatically forfeit his office unless he shall submit to the Board an explanation which is acceptable and which shall be so recorded.

Sec. 4. The Board of Directors shall hold regular quarterly meetings. Special meetings may be called by the President or at the call of fifteen members of the Board provided that due notice of the time and place of such meetings is sent to each member of the Board.

Sec. 5. The Board of Directors and officers shall from time to time seek the opinions and advice of Member Boards on matters of national import in such manner as may be convenient and shall take such information into consideration in their deliberations.

Article V.

Executive Committee

Section 1. There shall be an executive committee of nine members of the Board of Directors consisting of the President, the Vice President first nominated, the Treasurer, and six directors chosen by the President.

Sec. 2. The Executive Committee shall conduct the affairs of the Association in accordance with the policies and instructions of the Board of Directors. The Committee shall meet upon the call of the President, the Board of Directors, or any five of its members, stating the time and place of meeting. Five members shall constitute a quorum.

Sec. 3. The Executive Committee shall adopt by Decem

ber 15th if practicable, and in any event not less than fifteen days prior to the taking of office by the President and the Executive Committee for the ensuing year, after reference to the Finance Committee for its consideration and recommendations, a budget for the ensuing fiscal year which it shall submit to the Board of Directors for approval as soon as may be after January 1st of each year.

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Article VI

Advisory Board

Section 1. There shall be an Advisory Board composed of all former Presidents of the National Association who continue to be affiliated with their local boards.

Sec. 2. The Advisory Board shall act in advisory capacity to the Officers and Directors of the National Association.

Article VII

Officers and Departments

Section 1. The elective Officers of the National Association shall be a President, a Vice President from each of the Regions created by the Board of Directors, a Treasurer, and a corporate Secretary, all of whom shall serve for one year or until their successors are elected and qualified.

The President shall not be eligible for a second or subsequent election.

Sec. 2. The President shall be the chief executive officer of the Association and shall preside at its meetings and those of the Board of Directors and Executive Committee, between the sessions of which he shall have the authority to represent the Association and act in its name subject only to its declared policies. He shall appoint all committees unless otherwise directed by the Board of Directors, shall be an ex-officio member of all committees, and shall perform all other duties usual to such office.

Sec. 3. (A) The Vice Presidents shall in the order of their nomination perform the duties of the President in the event of his absence or disability. They shall supervise the work of the National Association in their respective Regions and act as the representative of the President in such matters as may be assigned to them.

(B) In case of a vacancy in the office of any Vice President, except the Executive Vice President, it shall be filled by the Board of Directors for the unexpired term from the Region in which the vacancy occurs, and such Vice Presi-

dent shall be regarded as the last nominee under the provisions of Paragraph (A).

1516 Sec. 4. The Treasurer shall be the custodian of the funds and securities and disbursing officer of the National Association as well as of the funds and securities of the divisions and special funds or securities held or administered by the National Association. He shall be ex-officio a member of the Finance Committee.

He shall deposit the funds and securities in such depositories as the Board of Directors may designate and shall be relieved of responsibility therefor while in the custody of such depository subject, however, to any liability under his surety bond.

He shall provide a bond in a surety company qualified to do business in the State of Illinois or in the state of his principal depository in such amount as shall be prescribed by the Board of Directors, covering the funds and securities held by him for the Association or for other funds or securities in his custody as Treasurer; the expense thereof shall be paid by the National Association.

Sec. 5. There shall be a Finance Committee to be appointed by the President from the membership of the Board of Directors subject to the approval of the Board or of the Executive Committee. The Treasurer shall be ex-officio a member of this Committee and the Chairman shall be ex-officio a member of the Executive Committee.

Sec. 6. There shall be such other committees as may be designated by the Board of Directors or the Executive Committee, the members of which shall be appointed by the President unless otherwise directed by the Board of Directors or the Executive Committee.

Sec. 7. The accounts of the Treasurer and of the Association shall be audited at least quarterly by a Certified Public Accountant designated by the Board of Directors, or the Executive Committee.

Sec. 8. The Secretary shall keep the records and seal of the National Association and perform such other duties as are customary to the office, including acting as Secretary for the Board of Directors and the Executive Committee.

Sec. 9. The Board of Directors shall retain a General Counsel who shall perform the duties usual to such office.

1517 Sec. 10. The Board of Directors shall appoint a Comptroller who shall be a principal of a firm of Certified Public Accountants, and who shall conduct the pre-audit functions and shall perform such other functions as are usual to such office.

Sec. 11. There shall be an Executive Vice President who shall be appointed by the Board of Directors. He shall be the chief administrative officer of the Association, subject to the President, and the head of the staff charged with its selection, except the Directors of the three Departments provided for in Sec. 13, subject to the approval of the Executive Committee. He shall have supervision of the entire staff and shall perform such other duties as may be delegated to him by the Board of Directors, the Executive Committee or the President, and all other duties usual to such office.

He shall provide a bond in a surety company qualified to do business in the State of Illinois or in such other state as the headquarters of the National Association may be located, and of such amount as may be determined by the Board of Directors, the expense of such bond shall be paid by the Association.

Sec. 12. The Board of Directors may appoint the same person Executive Vice President as has been elected Secretary.

Sec. 13. The work of the Association shall be administered under three departments to be known as the Department of Public Relations, Administrative Department, and Department of Business Standards and Methods, to be headed respectively by a Director, an Administrative Secretary, or Director, and a Director, who shall be appointed by the Board of Directors.

Article VIII

Delegates and Voting

Section 1. Board Members present at any meeting of the National Association shall be delegates, entitled to participate fully in all discussions and deliberations.

Sec. 2. In the election of officers and directors and other matters voting shall be by Boards. The president of a Member Board in good standing, or his duly accredited alternate, shall in viva voce or roll call voting cast the vote for his Board and he shall be entitled to as many votes as his Board has Realtor members in good standing, which votes he shall cast proportionately as determined by the vote of the delegates present representing his Member Board.

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Sec. 3. The Presidents of Member Boards or their accredited alternates present at the annual convention shall elect the elective Directors of the National Association.

Sec. 4. The Presidents of Member Boards or their accredited alternates present at the annual convention shall

designate the officers of the National Association other than the Secretary, which designation shall constitute nomination by the Convention to the Board of Directors.

Sec. 5. The Presidents of Member Boards or their accredited alternates may make recommendations to the Board of Directors as to the general policies of the National Association and as to the actions to be taken upon specific questions.

Sec. 6. Presidents of Member Boards or accredited alternates from 25 Member Boards shall constitute a quorum.

Sec. 7. Presidents of Member Boards or their accredited alternates shall meet at the Convention and may meet at the Annual Meeting in January when specially called to do so by the Board of Directors in accordance with Article XI, Sec. 1.

Article IX

Elections

Section 1. The annual election of Directors and designation of Officers shall be held at the Annual Convention.

Sec. 2. There shall be a Nominating Committee of nine, of whom three shall be appointed by the Board of Directors, three by the Advisory Board, and three by the Delegates at the Annual Meeting. Members of the Nominating Committee shall vote in person only. If any member of the Nominating Committee, due to absence or disability, is unable to serve at its meeting during the Annual Convention, a vacancy shall be deemed to exist. Such vacancy shall be filled by the President of the Association
1519 through appointment from the body whose appointee is unable to serve.

Sec. 3. The Nominating Committee shall nominate to the Delegates one nominee for each place on the Board of Directors to be filled and propose one nominee for each elective office other than that of Secretary, and shall cause its report to be posted at a place provided for the purpose not less than 24 hours prior to the election.

Sec. 4. Delegates shall have the privilege of placing other nominations or proposals before the Annual Convention.

Article X

Fiscal and Elective Year

Section 1. The fiscal and elective year of the National Association shall be from January 1st to December 31st, inclusive.

Article XI

Annual Meeting

Section 1. (A) The Annual meeting of the National Association shall be held in January, and shall be a meeting of its officers, directors, and committees.

(B) The Board of Directors may issue a call for delegates of Member Boards to meet at the annual meeting upon sixty days' notice.

Sec. 2. Special meetings of the National Association shall be called by the Board of Directors or the President upon petition by twenty per cent of its Member Boards or by a petition signed by a number of Boards or individuals representing twenty per cent of the total Board and Individual Members of the Association.

Article XII

Divisions, Institutes, and Councils

Section 1. (A) For the purpose of affording those affiliated with Member Boards a greater opportunity for cooperation and discussion of administrative and business problems of the particular phases of the real estate business in which they are individually interested, the Board of Directors may establish Divisions, Institutes, or Councils of the National Association.

(B) No Division or Institute shall be established or maintained which has less than one hundred members.

1520 Sec. 2. (A) Divisions and Institutes shall represent major fields of activity in the real estate business. Divisions and Institutes may, with the approval of the Board of Directors, adopt by-laws, elect governing bodies and officers, prescribe qualifications for membership, and establish and collect dues, subject to the provisions of Article II, Section 7, of the By-laws of the National Association, which shall be segregated for their own use.

(B) Councils created for the consideration of administrative and business problems may elect a Chairman and appoint committees but may not levy dues or establish special membership requirements, provided, however, that this shall not apply to the Realtor Secretaries Council and the States Council.

Sec. 3. Divisions, Institutes, and Councils shall meet during the Annual Convention at such times as may be allotted by the Convention Committee. They may also meet at such other times and places as they may determine.

Sec. 4. Any action by the Divisions, Institutes, or Councils shall be subject to the approval of the Board of Directors.

Sec. 5. (A) Attendance at any or all meetings of the Divisions, Institutes, or Councils shall be open to all members of the National Association, provided that the privilege of such attendance at such meetings held in conjunction with the Annual Convention shall be subject to the payment of the Annual Convention registration fee.

(B) If Divisions or Institutes have established dues as provided in their by-laws, only members of such Divisions or Institutes shall be entitled to participate in their discussions, vote and receive, without added cost, their publications or other services.

Article XIII

Regions

Section 1. The Board of Directors may create not more than nine Regions in the United States and Canada, and may conduct Regional meetings and conferences in such Regions.

Article XIV

Relations With States and State Associations

Section 1. (A) There shall be a States Council in
1521 which each state or province having a state or provincial association recognized by the Board of Directors of the National Association may be represented by three State Councillors. Such Councillors shall be elected by the state or provincial association by the members thereof or by the governing of such association to serve for a term of three years; provided that the first election of Councillors after this amendment is adopted shall be on the basis of one Councillor for a period of one year, one for a period of two years, and one for a period of three years, with their successors elected for a full period of three years. Evidence of their election shall be filed with the Secretary of the National Association.

(B) The Council may select officers, appoint committees and otherwise provide for its procedure by the adoption of by-laws; provided, however, that such by-laws shall be subject to approval of the Board of Directors of the National Association.

(C) Voting in the States Council shall be by states and provinces, and each state or province shall have three votes.

(D) The States Council shall consider matters pertaining to state legislation, state taxation and state association policies, and may make recommendations to the Board of Directors respecting such matters. Any action of the States Council in matters of policy shall be subject to the approval of the Board of Directors of the National Association.

Sec. 2. The Board of Directors of the National Association may enter into a membership agreement with a state or provincial association of real estate boards which shall provide that all of the Member Boards of the National Association in a state or province must be and continue to be, as a condition of continued membership in the National Association, members of the state or provincial association of real estate boards of such state or province. The Board of Directors shall consider such a membership agreement only when and if requested by a state or provincial
1522 association, and a thirty-day notice of such application shall be sent to all members of the Board of Directors preceding the meeting at which it will be considered. An application for such a membership agreement may be granted by the Board of Directors provided that the state or provincial association complies with the following standards and conditions:

(A) Such Association shall be organized with local boards as its constituent members, except that it may have individuals as members in cities or counties where there are no organized real estate boards.

(B) Such Association shall adopt and agree to aid the National Association in enforcing the Code of Ethics of the National Association.

(C) Such Association shall adopt as minimum requirements for election of any board or any individual to its membership the minimum requirements established by the National Association from time to time.

(D) Such Association shall agree that after a specified date all of its member boards and individuals, as a condition of continued membership, shall also hold membership in the National Association.

(E) The application of such associations for a membership agreement shall be endorsed by a number of Member Boards and Individuals of the National Association in such State or Province representing ninety per cent of the Board and Individual Members therein.

When the Board of Directors shall have made a membership agreement with any state or provincial association of real estate boards complying with the above conditions, no real estate board or individual within the territory of such association shall be elected to membership in the National Association unless it or he shall be a member of such state or provincial association; and Member Boards and
1523 Individual Members of the National Association within the territory of such State or Provincial Association shall, as a condition of continued membership in the National Association, maintain their membership in such State or Provincial Association; provided, however, that the Board of Directors shall reserve the right of review on the application of any board refused membership in a State or Provincial Association; and of retaining as a member in the National Association any real estate board which resigns from a State or Provincial Association or which is expelled from such association for any cause other than the non-payment of dues on a parity with other Member Boards in such state or province.

Article XV

Gifts and Requests

Section 1. The National Association may accept gifts and bequests which shall be administered by the Board of Directors which shall constitute an endowment, the income from which shall be used to promote the objects of the National Association; and may accept gifts and bequests for specific purposes, provided such purposes shall have the approval of the Board of Directors, in which case such gifts or bequests shall be used only for the purposes and in the manner specified by the donor.

Article XVI

National Association Headquarters

Section 1. The National Association shall maintain adequate headquarters and staff at Chicago, Illinois, or at such other place or places as may be designated from time to time by the Board of Directors.

Sec. 2. The legal headquarters of the National Association shall be maintained in Chicago, Illinois, the state of incorporation.

Article XVII

By-Laws

Section 1. By-laws may be adopted or amended at any meeting by a majority of the Board of Directors,

provided the substance of the proposed amendments shall have been submitted to Member Boards at least thirty days in advance of their adoption.

Article XVIII

Amendments

Section 1. This Constitution may be amended by two-thirds of the number of votes cast by the Delegates of the Annual Meeting or the Annual Convention of the National Association, provided the proposed amendment shall first have been submitted in writing to and been reported upon by the Board of Directors, and provided further, that a written notice of the substance of the proposed change has been sent to each Member Board and Individual Member at least 30 days prior to the meeting of the National Association at which the amendment is to be considered.

By-Laws

Article I

Membership

Section 1. (A) Real Estate Boards shall be enrolled as Member Boards and individuals shall be enrolled as Individual or Property Owner Members when their written applications have been received and presented to the Board of Directors and when the Board of Directors shall find that the applicants have complied with the requirements of the Constitution and By-laws.

(B) The application of any real estate board for membership in the National Association shall be in such form as may be prescribed by the Board of Directors and shall contain a statement to the effect that it has been approved by a majority of the active members of the applying Board.

Sec. 2. No Member Board shall apply any arbitrary numerical or other inequitable limitation on its membership.

Sec. 3. Real Estate Boards applying for membership in the National Association shall, as a condition
1525 precedent to election, be organized with individuals and not firms or corporations as active members.

Sec. 4. Resignations of Member Boards shall be considered and acted upon by the Board of Directors of the National Association provided, however, that any Member Board tendering its resignation shall not be delinquent in its dues to the National Association; and provided further that such resignation shall clearly state the reasons therefor and, at a meeting called for the purpose of considering

such resignation, shall have been approved by a majority of its Board Members; or in the case of a State or Provincial Association by a majority of the local Real Estate Boards belonging to such Association.

Article II

National and Divisional Dues

Section 1. (A) The annual dues of each Board Member in the National Association shall be $10.00 and shall be collected by each Member Board from each of its active members quarterly in advance.

(B) For the purpose of this section, an active member of a Member Board shall be held to be any member who as a principal, partner or officer of a corporation is engaged in the real estate business in one or more of its branches of brokerage, management, mortgage financing, appraising, or land development and home building, except as an employee or salesman, and the Member Board shall pay National Dues for such member regardless of any membership classification created by the local Member Board.

(C) In January of each year each Member Board shall file with the National Association a list of its members for whom National dues are payable as defined in Paragraph (B), certified by the President and Secretary of the Board, and the Member Board shall pay dues for the current year to the National Association upon the basis of such list, provided, however, that adjustment shall be had each quarter for members delinquent, dropped or enrolled by the Member Board during the preceding three months, and
1526 provided further that when delinquent dues are collected by the Member Board the proportion due to the National Association shall be remitted promptly.

(D) In the collection of the dues of Board Members by the Member Board, it shall list as a separate item the amount of the National dues due at each billing, which when collected shall be kept as a separate fund and remitted quarterly to the National Association.

Sec. 2. The annual dues of each Individual Member of the National Association shall be $15.00, payable annually in advance, and shall include the cost of direct mailings and services.

Sec. 3. Board Members of the National Association as defined in Article III, Section 1, Paragraph (C) of the Constitution, desiring to receive individual direct services and mailings from the Association may do so upon payment of

their National dues for at least three months in advance, in addition to the necessary service fee. Such service fee shall be $5.00 per year.

Sec. 4. The annual dues of Property Owner Members shall be $10.00, payable in full annually in advance, which shall include cost of all direct mailings and services. Such dues may be paid directly or collected and remitted by Member Boards.

Sec. 5. Any delinquent Member Board or Individual Member or Property Owner Member may be dropped from membership by the Board of Directors in its discretion.

Sec. 6. Each person attending the Annual Convention shall pay such registration fee as shall be provided for by the Board of Directors.

Sec. 7. (A) The annual membership dues in each of the divisions shall be at least $10.00, except the Brokers Division, whose dues shall be not less than $5.00.

(B) Upon the giving of notice of at least thirty
1527 days, and subject to the approval of the Board of Directors of the National Association, any Division or Institute, by the affirmative vote of eighty per cent of the active members present at a meeting held in connection with the Annual Convention, may:

1. Increase the annual membership dues.
2. Establish active, associate, and sustaining forms of membership.

The payment of dues in a Division or Institute shall entitle every member to such rights and privileges as may be provided in its By-laws, subject to the approval of the Board of Directors of the National Association, except that the exercise of such rights and privileges at any session of a Division or Institute held in conjunction with the Annual Convention shall be further subject to the payment of the Annual Convention registration fee, and to the Convention regulations of the National Association.

Article III

Code of Ethics

Section 1. Each Member Board shall adopt the Code of Ethics of the National Association as a part of its rules and regulations for violation of which disciplinary action may be taken.

Sec. 2. Any Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its constituent members may,

after due notice and opportunity for hearing, be expelled from membership in the National Association by the Board of Directors.

Article IV

Use of Term "Realtor"

Section 1. Upon application from a Member Board, the Board of Directors may license such Board to use the term "Realtor" as a part of its name under the following conditions:

(A) Such Board shall be organized with individuals only as active voting members having the right to vote upon matters affecting the conduct of real estate business.

(B) Such Board shall sign a written agreement with the Board of Directors of the National Association agreeing to eliminate the term "Realtor" from its name immediately when and if it shall cease to maintain or lose its membership in the National Association.

(C) The use of the term "Realtor" in the name of such Board shall be in such manner as may be approved by the Board of Directors, the recommended form being "The ..... Board of Realtors."

Sec. 2. (A) Board Members and Individual Members, who are engaged in the real estate business, while in good standing in the National Association, are hereby licensed upon their election to use the term "Realtor" in connection with their businesses in such a manner as to indicate their affiliation with a Member Board and with the Association and subject to the right of each Member Board to control such use within its territory.

(B) If a firm, co-partnership or corporation holds active membership in a Board which permits firm, co-partnership or corporate memberships, such firm, co-partnership or corporation member may use the term "Realtor" in connection with its name thus: "The ..... Real Estate Company, Realtors."

(C) If a firm, co-partnership, or corporation which is wholly or partly engaged in the real estate business is represented by one or more members of such firm or co-partnership, or by an officer financially interested in such corporation, in the active membership of a Member Board not permitting corporate, co-partnership or firm memberships, such firm, co-partnership, or corporation may use the term "Realtor" in connection with its business in the same manner as provided in Paragraph B.

Sec. 3. The term "Realtor" shall not be used as a part of the corporate name or title of any firm, co-partnership, corporation, or building except as provided in Section 1 of this article.

1529 ARTICLE V

TERRITORIAL JURISDICTION

Section 1. Each Member Board shall have jurisdiction over its territory. The territory of a Member Board shall be such as is specifically approved by the Board of Directors of the National Association, and the name of each Member Board shall be generally descriptive of its location and wherever feasible of its territory.

Sec. 2. If the territory of a Member Board has never been approved, the Board of Directors of the National Association shall, upon notice to such Member Board and an opportunity for a hearing if desired, define its territory, and such action shall be binding upon the Member Board concerned.

Sec. 3. Jurisdiction of a Member Board is hereby defined as meaning:

(A) The right to control the use of the term "Realtor" within its territory subject to the conditions set forth in these By-laws, and

(B) The right to have as a member, any person engaged in any branch of the real estate business, including brokerage, management, mortgage financing, appraising, home building and land development, and other related aspects of the real estate business, whose principal business or headquarters is within the jurisdiction of the Board.

Sec. 4. No Member Board shall accept in any form of membership a person who has his headquarters or who is engaged in any branch of the real estate business, including brokerage, management, mortgage financing, appraising, home building and land development, or other related aspects of the real estate business, within the territory of another Member Board unless such person is a member of such other Member Board, or unless such other Member Board has consented in writing to such membership.

Sec. 5. (A) No Board Member or Individual Member shall use the term "Realtor" in connection with an
1530 established real estate office maintained within the territory of a Member Board of which he is not a Member without the written consent of such Board.

(B) No Member Board shall permit the use of the term "Realtor" by any of its Members in connection with an

established real estate office maintained within the territory of another Member Board of which he is not a Member without the written consent of such other Member Board. Any Member Board within whose territory this regulation is violated may complain of such violation to the Member Board of which the violator is a Member which shall thereupon take the necessary steps to enforce this provision. If it fails to do so, the complaining board shall have the right to submit the matter to the National Association for appropriate action.

Article VI

Committees

Section 1. The President shall appoint such standing and special committees as shall be designated from time to time by the Board of Directors and such other special committees as he may deem necessary or appropriate.

Sec. 2. Any action by a committee shall be subject to the approval of the Board of Directors or the Executive Committee or its executive officers.

Article VII

Amendments

Section 1. These By-laws may be adopted or amended at any meeting by a majority of the Board of Directors, provided the substance of the proposed amendments shall have been submitted to the Member Boards at least thirty days in advance of their adoption.

Article VIII

Section 1. The order of business of the National
1531 Association and its divisions and committees, except when otherwise provided, shall be:

1. Call to Order.
2. Taking of the Roll.
3. Application for Membership.
4. Reading of Minutes.
5. Reports of Officers.
6. Reports of Committees.
7. Unfinished Business.
8. New Business.
9. Appointment of Committees.
10. Election of Officers.

Sec. 2. (A) The substance of any resolution to be introduced at any Annual Convention, Annual Meeting, or special meeting, regularly called, in accordance with the

Constitution and By-laws, shall be submitted in writing to the Member Boards at least fifteen days in advance of its introduction.

(B) This provision may be waived by the consent of two-thirds of the delegates present and entitled to vote at such convention or meeting.

(C) This provision shall not apply to any resolution authorized by the affirmative vote of two-thirds of the Directors present at any regularly constituted meeting of the Board of Directors of the National Association.

Sec. 3. All resolutions and motions must be made in writing, if the presiding officer so requests, or the request is by majority vote of the Delegates present at any meeting.

Sec. 4. Roberts' Rules of Order, Last Edition, shall be recognized as the authority governing the meetings of the National Association, or its committees, when not in conflict with its Constitution or By-laws.

1532 REGULATION ON INSTITUTE MEMBERSHIP AS AMENDED AND APPROVED

REGULATION

Membership in the Institutes established by the National Association of Real Estate Boards shall be governed by the following conditions:

1. Persons desiring to hold membership in the Institutes shall be affiliated with local Member Boards and shall hold such form of membership as the local board may determine or shall, if elected from territory where there is no Member Board, hold a direct membership in the National Association. This general rule is, however, subject to the following added provisions:

(a) Persons associated with institutions of research or higher learning and not engaged in the real estate business, whose activities do not fall within the jurisdiction of any one Board, and who desire to become affiliated with the Institutes in order to assist in the advancement of knowledge or education, may be elected to direct membership in the Association and thus become eligible for Institute membership.

(b) Persons engaged in the real estate business in any of its branches and who come within the jurisdiction of any Member Board shall hold active membership in such board if the board so requires, but if permitted to hold some other form of membership they shall in any event be required to pay dues to the National Association on a parity with Realtors, if such persons are to be eligible to any form of membership in the Institutes which requires examination and qualification, and which holds out to the public that such persons are possessed of special knowledge and qualifications.

(c) Persons shall be eligible for a type membership in the Institutes not requiring any form of examination or qualification if they are affiliated with the local board in any form of membership, or if the local board so determines, providing they are employed by a member of the local board. Persons in this classification shall not be required to pay national dues, except as required by their local membership classification.

2. Applications received for membership in the Institutes after the adoption of this resolution shall be cleared with Member Boards within whose jurisdiction the applicant may come, in order to determine if the above conditions have been, or will be complied with.

3. Compliance on the part of existing members of the Institutes to the above regulations shall be completed by January 1, 1945.

4. Cases involving special considerations or not falling clearly within the above stated conditions shall be adjusted by agreement between the president of the local board where such case may arise and the president of the National Association of Real Estate Boards, or his duly appointed delegate, and the president of the Institute concerned or his duly appointed delegate.

5. When the status of any Institute member is changed so that the conditions obtaining at the time of his admission are altered, then such Institute member shall within one year comply with the terms of this regulation.

6. No chapter or local unit of an Institute of the Association shall be established within the jurisdiction of a Member Board without the approval of such Board.

APPROVED BY THE MEMBERS OF THE
COMMITTEE ON CONSTITUTION AND BY-LAWS OF THE
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS

1532-A

Government's Exhibit 8

ALL REALTORS ARE REAL ESTATE MEN . . .

(cut) but not all real estate men are *realtors* . . .

TAKE careful notice of the difference! When your problem is buying, selling, leasing, renting, financing or building, call upon a REALTOR . . . it is your best guarantee of dependable, experienced real estate service. REALTOR is a professional title earned by long experience, sound knowledge and personal integrity . . . and held only by strict adherence to a written CODE OF ETHICS. In the Metropolitan Area, only members of a Real Estate Board which is affiliated with the National Association of Real Estate Boards and licensed thereby, are privileged to use it . . . a privilege neither freely given nor lightly held! The Real Estate Board members listed below are All Washington REALTORS . . . avail yourself of their services to assure yourself complete protection and competent real estate counsel . . . at no extra cost.

MEMBERS OF THE WASHINGTON REAL ESTATE BOARD

Acacia Mutual Life Ins. Co.
Aldon Construction Co.
American Bldg. Assn.
American Co., The
American Security & Trust Co.
Bacas, Aris H.
Bangs, H. Clifford
Banks & Lee, Inc.
Barkley-Brothers
Bartow Realty Co., Inc.
Beitzell, J. Garrett
Bellhore, Joseph F.
Bennett, Gatewood S.
Berens, Frederick W., Inc.
Berry & Son, J. McKenney
Blackistone, R. S.
Blumer, Frederick A.
Boaz, J. Noble
Borger, George L.
Boss & Phelps
Bowie, G. Calvert
Bradley-Beall & Howard, Inc.
Brenninger & Sons, Inc., L. E.
Brodie & Colbert, Inc.
Brown, Walter A.
Bruno Co., Joseph E.
Buchanan, J. Wesley
Burgess, Nettie Mae
Burnside, Bradford L.
Burr, Chas. E.
Cafritz Co.
Capital View Realty Co.
Carr, Edward R.
Carr, Oliver T.
Carry Properties, Albert
Cassel, Nelle Lowe
Columbia Federal Savings & Loan Assn.
Conner, J. Merrill
Conner & Ryon
Cooley Bros.
Crandall, Paul D.
Crane & Helan
Crumbaugh, A. D.
Davidson & Davidson
Davis Co., Floyd E.
Davy, Myron
District Building & Loan Assn.
District Lawyers & Wash. Title Ins. Co.
Donnelly, J. Lee
Donohoe & Sons, John F.
Doyle, Frank M.
Dreyfuss Bros.
Drury Realty Corp.
Dunigan, Inc., D. J.
Dunne, R. G.
Duty, G. G.
Eastern Bldg. & Loan Assn.
Ellis, Edwin L.
Ellis, Wm. R.
Equitable Coop. Bldg. Assn.
Equitable Life Ins. Co.
Fidelity Mortgage Inv. Co.
Fidelity Storage Co., R. E. Dept.
First Federal Savings & Loan Assn.
Fisher, Jess & Co.
Fisher & Co., Inc., Thos. J.
Fitch, Fox & Brown
Flather, Inc., Wm. J., Jr.
Gardiner & Co., A. S.
Garvin, O. H.
Gilliat & Co.
Godden & Small
Grady & Son, J. Dallas
Graham-Hall.
Graham & Ogden
Gravatte, L. T.
Graves, S. C.
Groomes, L. W.
Gunn, Charles S.
Hagner & Co., Randall H.
Hampton, Thos. E.
Handy, Levin P.
Hall, Richard B.
Harlan & Co., Laura
Hartman Realty, Inc.
Hayes, Inc., Jack
Herbert & Sons, Joseph A.
Hill, Frances Powell
Hill Co., Inc., Wm. Corcoran
Hillegeist, C. H.
Hines, N. C.
Hohenstein Bros.
Hollander, Robert B.
Holther, Harriet
Humphries, R. A.
Jarrell Co., Thos. E.
Jones & Co., Inc., Edw. H.
Kass Realty Co.

Kelley & Branner
Kessler, Bruce R.
Keyser & Son, A. G.
Koones & Co., Chas. C.
Lamb, Leon F.
Landvoigt, Albert E.
Latimer, Roberts E.
Lawyers Title Ins. Corp. of Richmond
Lebling, Wm. L.
Lee, Adelbert W.
Legum & Gerber Realty Co.
Linkins Co., Geo. W.
Loughborough Development Corp.
Loveless, Harry R.
Marceron, R. V.
Martin, S. R. & Co.
Maryland Real-Estate Co.
Massachusetts Mutual Life Ins. Co.
McDevitt, Amos W., t/a Service Realty Co.
McKeever Co., Inc., J. A.
McKeever Co., Robert L.
McKenna, John J.
McLachlen Banking Corporation
Metzler, Cuvier A.
Middleton, F. Eliot
Miller, George D.
Miller Development Co., W. C. & A. N.
Miller, John H., Jr., & Bro.
Mills, Benjamin J.
Mohler, J. Rupert, Jr.
Mollan, Wm. W.
Monroe Development Corp.
Moore & Hill Co.
Morgan, A. H., Texas Co.
Moss, George J.
Moss, Roger S.
Mount Vernon Mortgage Corp.
Munsey Trust Co.
Murray Co.
National Capital Bank of Washington
Natl. Liberty Ins. Co. of America
National Metropolitan Bank
National Mortgage & Inv. Corp.
National Perm. Bldg. Assn.
National Savings & Trust Co.
Norris, Charles L.
North Washington Housing Corp.
O'Connor, John J.
Owen & Son, Thos. J.
Owens Realty Co.
Owings, Frank
Parker Co., C. H.
Pearson, Stanley
Peddicord, Robert
Perpetual Building Ass'n.
Phifer, Eugene H.
Phillips, Frank S.
Phillips, Thomas L.
Phillips, Canby & Fuller, Inc.
Pratt Co., Inc., F. M.
Ragsdale, Wm. B.
Real Estate & Columbia Title Ins. Co.
Realty Associates, Inc.
Realty Management Corp.
Ripley, R. P.
Robb, Inc., Henry J.
Roberts, Eugene B.
Rosinski, Carl G. & Co.
Rust Co., H. L.
Safeway Stores, Inc., F. G. Kayhoe
Sandoz, Inc.
Saul Co., B. F.
Saunders Co., Inc., Wm. H.
Savage, Robert W.
Schneider Corp., T. F.
Schwab, James E.
Schwartz, William
Scott, Emma Moore
Scrivener & Bro., John
Seidenspinner, A. H.
Senate Realty Co.
Shannon & Luchs Co.
Shea, James McDonald
Sherwin, C. Allen
Shipley, Walter L.
Shockey & Moorhead
Shoemaker, Louis P. (Edgar D. Turner)
Simpson & Co., Inc., C. W.
Smith, Inc., E. Quincy
Smith, Fred A.
Smithy Co., H. G.
Spruce, Samuel S.
Standard Properties
Stevens, Albert Howard
Stickle, Wilmer F.
Stimson, Richard D.
Stone, Paul P.
Stone, Inc., Paul T.

Story & Co.
Suburban Title Inv. Corp.
Sullivan Brothers
Taylor, Inc., Waverly
Thomas, William M.
Thornton, H. L.
Throckmorton, Wm. M.
Tompkins, Chas. H.
Troiano, Pat
Tucker, James E.
Turner, Lloyd R.
Tyler & Rutherford, Inc.
Vernon, Benjamin H.
Waggaman-Brawner Realty Corp.
Walker & Dunlop, Inc.
Walker, Curtis
Walshe, Inc., P. J.
Waple Co., Marshall J.
Washington Loan & Trust Co.
Washington Permanent Bldg. Assn.
Washington Properties, Inc.
Weaver Bros., Inc.
Weedon & Co., Inc., J. C.
Weinberg Co., J. A.
Weschler & Son, Inc., Adam A.
Wesley, Ottis H.
Whiteford, Inc., Guy
Winkler, Mark
Winston Co., Carey
Wire, Preston E.
Wise, Joseph M.
Woodward, James Morris
Worthington & Son, George Y.
Young, Gorman P.
Y. & O. Realty Co.
Zantzinger, Richard C.

WASHINGTON REAL ESTATE BOARD, INC.
1417 K STREET NORTHWEST

1533 *Government's Exhibit 9*

WASHINGTON REAL ESTATE BOARD, INC.
1417 K Street, Northwest Washington 5, D. C.

Application for Membership

ACTIVE membership shall be limited to corporations, partnerships or individuals operating as real estate brokers and actually engaged in the real estate business in the District of Columbia and that portion of the Metropolitan area located in Montgomery and Prince George's Counties, Maryland, provided, however, that any such corporations, partnerships, or individuals must have maintained an office and office hours for a period of at least one year immediately preceding the date of application.

"Banks, Trust Companies, and persons, firms or corporations, whose business is closely allied with real estate shall be eligible for active membership without being establishd and/or licensed as real estate brokers.

"Corporations and partnerships shall only be entitled to one vote, and they shall designate the person authorized to cast the same."

"REALTOR"—*Its Meaning and Use*

DEFINITION AND CONNOTATION

A *Realtor* is a "person engaged in the real estate business who is a Board Member or an Individual

Member of the National Association of Real Estate Boards, is subject to its rules and regulations, observes its standards of conduct, and is entitled to its benefits." *Realtor* is so defined in the Association's Constitution, Article II, Section 5. The Association diligently promotes its proper use as a safeguard for the public in dealing with real estate agents.

The term *Realtor* is not a synonym for "real estate agent". It is the distinctive and exclusive designation for those within the membership of the National Association. The term definitely connotes business competence and high standards of business conduct. Every Realtor has pledged that he will observe and abide by the Code of Ethics promulgated by the Natianal Association, and adopted by his own Board to govern real estate practices of members of the Board, and has manifested that he is of good business character and that he is capable of properly caring for real estate matters entrusted to him.

1534 The undersigned hereby applies for admission as an Active Member in the Washington Real Estate Board, Inc.:

Date.....

Name of Applicant.....

Business Address.....

Post Office Zone.....Business Telephone No. .....

Residence Address.....

Number of District of Columbia or Maryland Real Estate Brokers License.....

If licensed to do business in any other state, give name of State and Number of License.....

.....

State name of your firm or corporation.....

If a partnership, state names of all partners, designate senior partner.....

.....

If a corporation or company describe your connection therewith .....

Also gives names of all other officers and directors .....

.....

Designate the person to whom all official Board mail should be addressed.....

.....

Are you a citizen of the United States?.....

How long have you been a licensed broker?.....

When was your present business established?.....

Class of business in which you specialize: (check one)
Brokerage Property Management Mortgage Loans
Home Building Appraising

What other branches of the business are you or have you engaged in?.....
.....

What business or profession did you follow prior to taking up real estate?.....
.....

1535 If you are a member of any other Real Estate Board, give name of Board and length of time affiliated therewith.....

Financial references:
What bank or banks do you deposit in?.....
Trust companies with whom you generally deal.....
.....

Do you hold membership in any professional or technical groups?.....
If so, name.....

Are you a member of any of the Institutes or Divisions of the National Association of Real Estate Boards?
If so, name.....
.....

What has been your occupation in the five years preceding the time of making this application?.....
.....
.....

Name at least two Active Members of the Washington Real Estate Board who are not members of the Membership Committee who have an intimate personal knowledge of you, with whom the Membership Committee may confer freely;
.....
.....

Were you ever associated with or employed by a Realtor?
.....
Gives names:.....

In making this application, We, hereby waive all claims against the Board, its officers, directors, employees, and any and all members, arising out of any act in connection with the consideration, rejection or acceptance of this application; having read the Constitution and By-Laws, Code of Ethics and other rules of the Board, agree that if elected to membership, We, subscribe to them and agree that We, and all employees, will be guided by them in our transac-

tions with the public and our fellow-member. We agree to pay dues of $100.00 per year, payable in advance or quarterly on October 1, January 1, April 1, and July 1.

Signature.....

.....

Application must be endorsed by at least one Active Member other than members of the Membership Committee.

Endorsed.....Date.....

Approved.....

Chairman, Membership Committee

.....

Elected by Board of Directors.....

Annual Dues $100.00 payable in advance October first. Dues charged on a pro rata basis on applications dated after October first. Dues must accompany application. Members may have the privilege of paying dues in quarterly installments. Make Checks Payable to Washington Real Estate Board.

1536 Services of the Washington Real Estate Board Available to its Members

Baist's Plat Books of the District of Columbia. Four volumes, all the most recent editions.

Plats of Subdivisions since 1929.

Assessment Book Service.

Klinge's plats of Montgomery County, Maryland.

Franklin Survey Company plats of Arlington County, Virginia.

Franklin Survey Company Plats of Prince George's County, Md.

Zoning Maps of Washington and Metropolitan Area—posted following all hearings in District of Columbia.

Zoning Changes—notification prior to and following all hearings.

Ownership Record—a complete card file showing the record ownedship of all lots and parcels within the District of Columbia, posted within 48 hours of recordation of instruments. Cards filed by lot and square.

"Realtor."

Apartment House File—record of owner, location and agent.

Right to use standard forms and new copyrighted Apartment Rental Agreement.

Building Permits covering all dwellings, apartments and flats—shown by street address and giving pertinent information on builder, costs, etc.

Statistical data covering deeds recorded, deeds of trust and foreclosures, and sources of funds.

Library of special works on all phases of Real Estate Business.

Services of National Association of Real Estate Boards; Divisional activities; special bulletins; Appraisal and Management Journals.

License to Active Members for use of designation "Realtor."

Weekly Letter on Real Estate—"HEADLINES."

Special consultation service to aid members in solving problems pertaining to their business; service of standing and special committees; and cooperative effort to stabilize practices through standardization and study.

Information on any phase of real estate practice furnished members either in person or by telephone—NATIONAL 4494-4495.

1537 *Government's Exhibit 10*

WASHINGTON REAL ESTATE BOARD
(INC. JULY 19, 1928)

MEMBER NATIONAL ASSOCIATION OF REAL ESTATE BOARDS
1417 K STREET, NORTHWEST
WASHINGTON, D. C.

Application for Active Membership

"Active membership shall be limited to corporations, partnerships or individuals operating as real estate brokers and actually engaged in the real estate business in the District of Columbia and that portion of the metropolitan area located in Montgomery and Prince Georges' Counties, Maryland, provided, however, that any such corporations, partnerships or individuals must have maintained an office and office hours for a period of at least one year immediately preceding the date of application.

"Banks, Trust Companies and persons, firms or corporations, whose business is closely allied with real estate shall be eligible for active membership without being established and/or licensed as real estate brokers.

"Corporations and partnerships shall only be entitled to one vote, and they shall designate the person authorized to cast the same."

RECORD OF APPLICANT

Full name F. M. Pratt Company, Inc.,
Present Office Address 1017 K Street, northwest
Date Present Business was Established In 1919

MICRO CARD
TRADE MARK ®

1495

MATTHEW BENDER & COMPANY MB

49

Name of Brokers Previously Associated with, if any, F. M. Johnson—Royal Bartlett

If Applicant is a Partnership, Firm or Corporation, List Names of Individual Partners, Members of Firm or Officers of Corporation actively engaged in the business of same: F. M. Pratt, President—Iva M. Pratt, Vice President—O. Woodie, Secretary and Treasurer

1

We hereby apply for Active Membership in the Washington Real Estate Board, and having read its Constitution and By-Laws, Code of Ethics and all conditions of Membership, agree to abide by same.

Signature of Applicant:

F. M. Pratt Co. Inc.
(Company)

F. M. Pratt—*Pres.*

1/11, 1940

Endorsed by Theo James & Son

Thornton W. Owen
Active Member

Thorton W. Owen
Approved by Membership Committee

.....
Chairman

Elected by Board of Directors 1/17/40

Annual Dues $100.00 payable in advance October first.

Dues charged on a pro rata basis on applications dated after October first.

Dues must accompany application.

Members may have the privilege of paying dues in quarterly installments.

Make check payable to Washington Real Estate Board.

1538

"Realtor"

Its Meaning and Use

Definition and Connotation

A *Realtor* is a "person engaged in the real estate business who is a Board Member or an Individual Member of the National Association of Real Estate Boards, is subject to its rules and regulations, observes its standards of conduct, and is entitled to its benefits". *Realtor* is so defined in the Association's Constitution, Article II, Section 5. The Association diligently promotes its proper use as a safeguard for the public in dealing with real estate agents.

The term *Realtor* is not a synonym for "real estate agent." It is the distinctive and exclusive designation for those within the membership of the National Association. The term definitely connotes business competence and high standards of business conduct. Every Realtor has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association, and adopted by his own Board to govern real estate practices of members of the Board, and has manifested that he is of good business character and that he is capable of properly caring for real estate matters entrusted to him.

SERVICES OF THE WASHINGTON REAL ESTATE BOARD AVAILABLE TO ITS MEMBERS

Baist's Plat Books of the District of Columbia. Four volumes, all the most recent editions.

Plats of Subdivisions since 1929.

Assessment Book Service.

Klinge's plats of Montgomery County, Maryland.

Franklin Survey Company plats of Arlington County, Virginia.

Zoning Maps of Washington and Metropolitan Area—posted following all hearings in District of Columbia.

Zoning Changes—notification prior to and following all hearings.

Ownership Record—a complete card file showing the record ownership of all lots and parcels within the District of Columbia, posted within 48 hours of recordation of instruments. Cards filed by lot and square.

Apartment House File—record of owner, location and agent.

Right to use standard forms and new copyrighted Apartment Rental Agreement.

Building Permits covering all dwellings, apartments and flats—shown by street address and giving pertinent information on builder, costs, etc.

Statistical data covering deeds recorded, deeds of trust and foreclosures, and sources of funds.

Library of special works on all phases of Real Estate Business.

Services of National Association of Real Estate Boards: Divisional activities; special bulletins; Appraisal and Management Journals.

License to Active Members for use of designation

Semi-monthly digest on Real Estate—"FREEHOLD."
Special consultation service to aid members in solving problems pertaining to their business; service of standing and special committees; and cooperative effort to stabilize practices through standardization and study.
Information on any phase of real estate practice furnished members either in person or by telephone—NATIONAL 4494-4495.

1539 *Government's Exhibit 11*

Washington Real Estate Board
Incorporated
1417 K Street, Northwest
Washington, D. C.

Application for Active Membership

"Active Membership limited to licensed brokers who have maintained an office for at least one year preceding date of application."

RECORD OF APPLICANT

Full name WALKER & DUNLOP, INC.
Present Office Address Rm. 517, 1010 Vermont Ave., N. W.
Date Present Business was Established 1931, Incorporated 1937.
Name of Brokers Previously Associated with, if any, None (operated as Oliver M. Walker from 1931 to 1935, Walker & Dunlop as partnership to Nov. 1937, Incorporated 1937.
If Applicant is a Partnership, Firm or Corporation, List Names of Individual Partners, Members of Firm or Officers of Corporation:
Oliver M. Walker, President and Treasurer.
Elizabeth D. Walker, Vice-President.
Alfons B. L[illegible]da, Secretary.
Wm. Laird Dunlop, III, Asst. Secretary.
Alan E. Re[illegible]side, Asst. Treasurer.
We hereby apply for Active Membership in the Washington Real Estate Board and agree to abide by its Constitution and By-Laws and all conditions of Membership.

Signature of Applicant
WALKER & DUNLOP, INC.
OLIVER M. WALKER, *Pres.*

March 10, 1938.

Endorsed by:
THOMAS W. SANDOZ
Active Member

.....
Approved by Membership Committe
.....
Chairman

Elected by Board of Directors March 16, 1938.

Annual Dues $100.00 payable in advance October first.

Dues charged on a pro rata basis on applications dated after October first.

Dues must accompany application.

Make check payable to
Washington Real Estate Board.

1540 *Government's Exhibit 12*

Memorandum of special Commission Study Committee held in the offices of the Board on Friday, February 10th, 1939 at 10:00 A: M.

Present: Chairman Smith, Messrs. Dodge, Herbert, Taylor, Phillips, Koones, Murray and Doyle, Chairman of the Brokers Committee.

The Chair stated that he had invited Mr. Doyle, Chairman of the Brokers Committee to meet with the Committee to discuss phases of the Committee's recommendations. In replying to various questions Mr. Doyle said that he did not believe builders would offer any opposition to new schedules; that it would not tend to encourage builders to have their own sales organizations; that the primary purpose was to eliminate the two commission zones; not to increase rates but not lower commissions; most sales were in the outlying 5% areas; that small house builders were not using brokers but using salaried men.

Mr. Smith stated that the original purpose in the appointment of the special Committee was to make a study of the cost of doing business, as discussed by Mr. Luchs at the time of his election as President.

The question of the attitude of Congress towards increased commission rates, as well as that of citizens associations, banks and trust companies, was also touched upon. The question as to the payment of advertising costs by builders was discussed and it was brought out that in some instances

a portion of the cost was borne by them, but in other cases all of the costs were paid by the developer. (Phillips)—That conditions are good in Washington (Smith); that he is in accord with any plan which would enable members to make more money but that after giving the subject a great deal of thought, and in consultation with other members he felt this was the wrong time for the Board to make any changes in its schedules.

Mr. Doyle suggested that it might be possible to have members of the Brokers Committee submit a statement covering what the proposed changes would mean in percentages of sales made by their respective offices during 1937 and 1938. He stated that in his case it would have made a slight difference—2% one year and 6% in another year; that the 5% to $25,000 rate might be too high and that some other base could be established if it was found that this proposed base would make too great a return.

* * * * * *

Everyone expressed the opinion that it would be desirable to do away with the two commission zones.

After having been excused from the meeting Mr. Doyle phoned Mr. Smith and stated that possibly a 4% rate for the entire District of Columbia could be established.

The various types of services rendered by members for which no fees have been established by the Board was also discussed and the suggestion made that in view of the fact that the National Association had appointed a special committee on commission rates and rules that copy of its report might be obtained for the consideration of the Committee.

1541 Mr. Smith had to leave the meeting at 12:00 o'clock and Mr. Murray took the Chair.

After a further discussion a motion, duly carried, was made to the effect that the Committee defer action on the recommendations of the Brokers Committee until such time as the Committee could come to a conclusion following its study of proposed service charges suggested by the National Association and the recommendations of Mr. Luchs.

It was suggested by Mr. Taylor that as Mr. Bangs has been named a member of the National Association's Committee on Commission Rates and Rules it might be well to appoint him as a member of the present Committee.

Adjournment.

1548 *Government's Exhibit 16*

PROGRESS REPORT
OF
COMMITTEE ON RATES, RULES, AND CUSTOMS
STRICTLY CONFIDENTIAL

ROBT. R. OTIS, Chairman

1549 TENTATIVE DRAFT
OF
SUGGESTIONS CONCERNING
RATES, RULES, AND CUSTOMS
PREPARED FOR STUDY OF MEMBERS
ON
RATES, RULES, AND CUSTOMS
OF
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS

1550 TENTATIVE DRAFT
OF
SUGGESTIONS CONCERNING
RATES, RULES, AND CUSTOMS

CONTENTS

SECTION I—Advertising
II—Advisory Services
III—Analyses
IV—Appraisal Fees
V—Arbitration Fees
VI—Architectural Fees
VII—Auction Fees
VIII—Building Fees, Repairs, Renovation, Etc.
IX—Building Restriction Adjustments
X—Buying Real Estate
XI—Consultant Acting as Owner of Property
XII—Definitions (General)
XIII—Division of Commissions
XIV—Exchange of Real Estate
XV—Expert Testimony and Opinions
XVI—Inspection Fees
XVII—Insurance
XVIII—Leasing and Renting
XIX—Loan Commissions
XX—Management of Property
XXI—Options to Buy Property
XXII—Sales Commissions and Rules
XXIII—Tax Adjustments or Reductions

charge such commissions and maintain such rules and regulations as may be in effect in the associations which represent the insurance business.

1555 XVIII.

LEASING AND RENTING

(A) *Gross Leases:*

Charge 7% on a one-year lease. On leases for a longer period charge 7% on the first year's rental and 1% on the total additional rental stipulated in the lease for the balance of the term except as provided in (C).

(B) *Net Leases:*

Charge 9% on a one year lease. On leases for a longer period charge 9% on the first year's rental plus 2% on the total additional rental stipulated in the lease for the balance of the term except as provided in (C).

(C) *Maximum Leasing Charge:*

The maximum charge for negotiating the leasing or the renting of property shall not exceed the commission payable for the sale of such property at a value computed by capitalizing the annual net income at 5% of such value.

(D) *Month to Month Tenancies:*

Charge 7% of first six months' rental or any fraction thereof; 7% for the second six months or fraction thereof; 1% for each additional six months or fractions.

(E) *Renewal, or Extension of Leases:*

If a lease is renewed to the same tenant, whether or not the tenant was originally secured by the agent, the agent shall charge one-half of the regular commission on the rental specified in the new lease.

If a lease contains a clause permitting renewal or cancellation, the agent shall charge for the actual term of the lease including the period covered by the renewal or the cancellation privilege. If the lessee exercises the privilege of cancellation, or does not renew a portion of the lease, the agent shall then rebate the difference

1551 I.

ADVERTISING *(sales or Rentals)*

(A) Agent shall charge owner with expenses of advertising, circularizing, etc., unless there is an agreement to the contrary. Owner shall have the right to limit or to control such expenses; the agent being advised in advance by the owner as to the limit or the amount of such expenditure.

(B) When property is priced at a rentable or a salable figure, the agent may advertise such listed properties at his own expense. Mere listing or placing of property with an agent, does not impose an obligation upon the agent to advertise at his own expense.

II.

ADVISORY SERVICES

(A) Charges for advisory service shall be by special arrangement and shall be commensurate with the importance of the subject matter and the time required. In no case shall the charge be less than $5.00 per consultation.

III.

ANALYSES

(A) For analysis and study of a property with recommendations for present or future price and for policy in handling, the fee shall be the same as an appraisal charge, plus 1% of the value up to and including the first $20,000 value, plus ½% of the value in excess of $20,000; minimum fee to be $75.00. The owner shall furnish and pay for any engineering studies or surveys necessary to complete an analysis of the property.

(B) For an analysis and study of a proposed new building with recommendations for present or future policy in handling, the charges shall be the same as above on the proposed final cost of land and improvements.

(C) If the analyst and consultant acts as the owner's representative in passing upon the details of the construction of the building, he shall charge an additional fee of 1% of the total cost of construction.

between the amount of commission for the entire term as computed under this Schedule and the commission on the reduced term.

(F) *Privilege of Purchase:*

If a lease contains an option to purchase, the agent shall charge the regular leasing commission and in addition a sales commission on the price at which the property is sold, if the sale privilege is exercised.

(G) *New Building and Improvements added Under Lease:*

If buildings are to be erected on ground involved in a lease, or additions are to be made to already existing improvements, the value of such added buildings or improvements is to be considered as added value or rent, and the agent shall charge
1556 the equivalent of a sale commission on this amount, payable by the lessor within 90 days of completion of such improvements or addition.

(H) *Purchase or Cancellation of Leases:*

If an agent procures a cancellation of a lease the regular rental commission shall be charged and applied to what would have been the total of the lease, had it run to its conclusion; the commission to be paid by the party whom the agent represents, or according to advance agreement.

(I) *Leasing Furnished Property:*

The charge for leasing furnished property shall be the regular commission on the amount received for both building and contents. (Lessor shall furnish inventory if required.)

(J) *Sub-Leasing:*

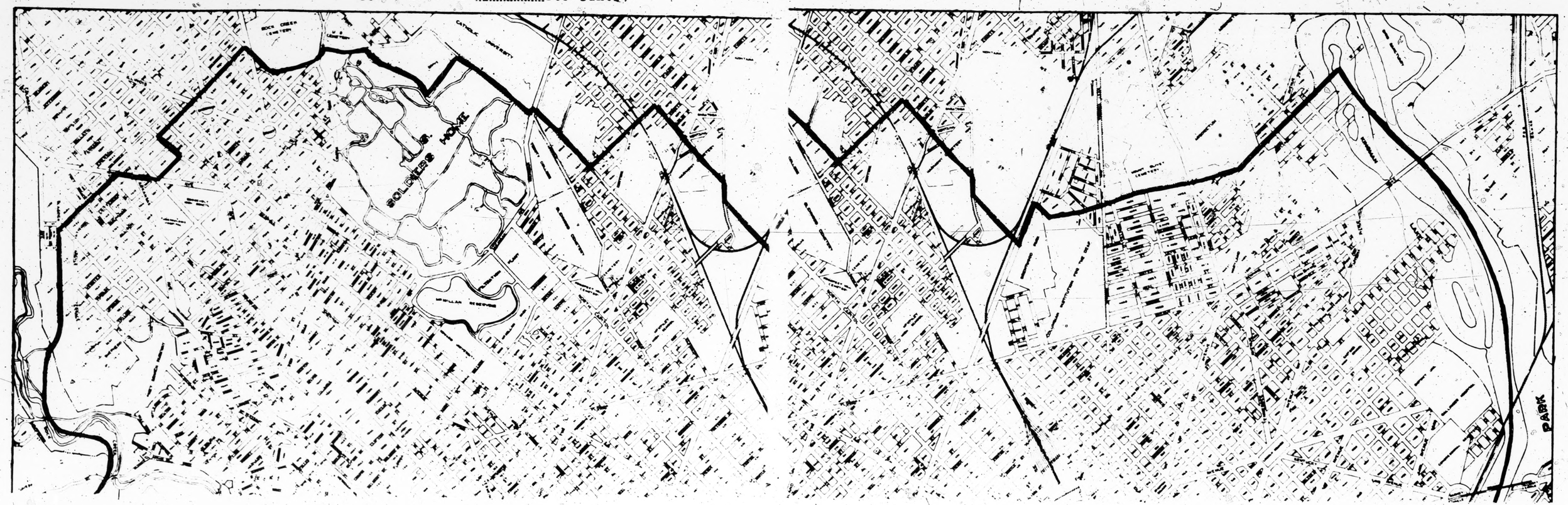
An agent shall handle each lease or sub-lease as a new transaction and shall charge the established rental commission on total gross rent. In case of a long term unexpired lease, the agent has the option to accept his commission as the monthly rentals are paid.

(K) *Withdrawals:*

If property is withdrawn from an agent prior to the expiration of the term created in lease, the agent shall be entitled to the full commission on the unexpired term.

Gov't Ext. No. 13 for identf.

for identf.



LINES DIVIDING 5 PER CENT COMMISSION ZONE FROM 5 AND 3 PER CENT ZONE FROM 5 AND 3 PER CENT:

Southern boundary, Potomac River thence
north on the line of 40th Street
east on Reservoir Road
north on 35th St.
east on T St. through the Park to Conn. Ave.
north on Conn. Ave.
west on Calvert St.
north on 29th St.
west on Cathedral Ave. to intersection of Woodley Road and 31st St.
east on Klingle Road through the park
north on Blagden Ave.
east on Decatur Street
south on Iowa Ave.
east on Buchanan St.
north on Georgia Ave.
east on Decatur St. to Rock Creek Cemetery
around eastern side of Soldiers Home to Michigan Ave.
east on Michigan Ave.
south on Fourth St.
east on Franklin St.
south on 10th St. to Brentwood Rd.
south on 9th St.
east on New York Ave. to 12th St.
south on 12th St. to Mt. Olivet Rd. to M St.
M St. to Kingman Lake to Anacostia River
and thence to the Potomac River

WHERE PROPERTIES FRONT ON THE BOUNDARY LINES BOTH SIDES OF THE STREET SHOULD TAKE THE LOWER RATE

1542

WASHINGTON REAL ESTATE BOARD October 1, 1934

IV.

APPRAISAL FEES

(A) Appraisal fees shall be based on the valuation according to the following schedule:

On amounts up to	$2,000	$ 25
On amounts from	$2,001 to $ 5,0000	$ 50
On amounts from	$ 5,001 to $10,000	$ 75
On amounts from	$10,001 to $20,000	$100

Plus $2.50 per thousand on amounts in excess of $20,001 and up to $100.00.

Plus $2.00 per thousand on amounts in excess of $100,001 and up to $500,000.

Plus $1.00 per thousand on amounts over $500,000.

Fees for appraisal of leaseholds, of groups of properties for a single client and of properties representing unusual problems shall be determined by special agreement.

1552 V.

ARBITRATION FEES—DIVISION OF ESTATES, ETC.

(A) Fees for arbitration, division of estates, etc., shall be the same as the fees for expert testimony.

(B) If appraisal work is necessary, an added fee as shown under head of Appraisal Fees shall be charged.

VI.

ARCHITECTURAL FEES

(A) If a Realtor operates an architectural department, or performs this character of service, he shall charge such fees and maintain such rules and regulations as may be in effect in the associations representing architectural services.

VII.

AUCTION FEES

(A) Auction fees shall be determined by special agreement, but shall be not less than the established sales commission, plus the cost of advertising and all special service rendered.

VIII.

BUILDING FEES, REPAIRS, RENOVATION, ETC.

(A) *New Construction:*

If a Realtor operates a construction department, or performs this character of service, he shall

(L) *Duration of Rental Rates or Quotations:*
Unless withdrawn in writing by the owner or his agent, a quotation of price shall be presumed to be binding for not less than 30 days.

(M) *Tenant Remaining Over:*
If no renewal clause exists but the tenant was originally procured through the effort of the agent, and the tenant remains in the premises on the same or different terms, the agent, if he continues his agency, shall charge the established monthly commission on the extended period; but he is not entitled to any additional part of the first month's rent.

(N) *Rental Quotations:*
Rental prices given an agent shall be presumed to be gross and shall obligate the owner to pay regular commissions on such prices.

(O) *Taking Over Property Having Tenants:*
If property which has tenants is taken over by an agent, the agent shall charge the regular commission on the amount collected, but not any part of the first month's rent in addition.

(P) *When Commission Earned:*
A Commission on a lease is earned and payable when, through the agency of the broker, the minds of lessor and lessee have met on the terms of the lease as evidenced by a cash deposit or written agreement.

1557 XIX.

LOAN COMMISSIONS

(A) For negotiating first mortgage loans the commission shall be:
3% of amount of the loan on improved property
5% of the amount of the loan on unimproved property.

(B) For negotiating second mortgage loans the commission charged shall be fixed by agreement but shall be not less than that for first mortgage loans.

(C) For negotiating construction loans the commission shall be 5% of the gross amount of the loan.

(D) For negotiating renewals, the commission shall be one-half the scheduled rate.

charge such commissions and maintain such rules and regulations as may be in effect in the associations representing the construction industry.

(B) *Additions, Improvements, Renovations:*
If substantial repair or remodeling jobs are done under the personal supervision of an agent, his charges shall be established by special agreement.

(C) *Repairs and Upkeep:*
If repairs are handled through a Realtor's office, and he does not manage the property, he shall charge for his services according to the following schedule:

Costs up to and including $500	10%
Costs from $500 to and including $2,000	5%

Costs over $2,000, a charge to be made in accordance with services rendered.

IX.

BUILDING RESTRICTION. ADJUSTMENTS:

(A) If a Realtor is required to gather facts and to appear before Planning and Zoning Commissions, or other such tribunals, a fee commensurate with the service rendered shall be charged. In no case shall the fee be less than $50. per day; minimum charge $50.

1553 X.

BUYING REAL ESTATE

(A) The same commission rates and rules as apply to sales shall apply to purchases, except that the owner shall pay the commission unless released because the agent holds an agreement from the purchaser to compensate the agent.

XI.

CONSULTANT ACTING AS OWNER OF PROPERTY

(A) If a Realtor acts as consultant and represents the owner in directing income property managed by other Realtors, the fee shall be 2½% of the gross rentals of the property; minimum charge $150. per year.

(B) If a Realtor who is the owner's consultant also manages the property and acts for the owner in its direction, he shall charge the regular management commission in addition to the 2½% of gross rentals.

(E) The minimum commission for negotiating any loan shall be $25.

(F) Commissions are net to the broker and borrowers shall pay other fees and costs.

XX.

MANAGEMENT OF PROPERTY

(A) The charge for management of property shall be the regular commission for negotiating sales, rentals, leases, or renewals, plus the following:

Business Property:

5% on the first $50,000 of gross annual income.
3% on the next $50,000 of gross annual income up to $100,000.
2% on the balance of gross annual income.
Minimum charge to be $3.00 per tenant unit managed.
In case of Commercial property with annual gross rental in excess of $100,000, if the managing agent enters into a contract for one year or more, the cost of management service shall be determined by special agreement.

Residential Property:

7% on all collections but not less than $3 per month for each family or other unit of occupancy, whether occupied or not.
In case of property having negligible or no income, the management charge shall be fixed by agreement, but at a rate not less than $25 per year for each building, parcel, or tract.

(B) *Termination*

When a management contract or agreement is terminated the managing agent shall charge regular commissions on the unexpired terms of all leases negotiated by him during the period of such contract and one-half commissions on all leases renewed by him.

1558 XXI.

OPTIONS TO BUY PROPERTY—*Where Secured by Realtor.*

(A) If a consideration, cash or otherwise, has been paid for an option arranged by a Realtor and the option is not exercised, the Realtor shall charge the principal granting the option one-half of the

Exhibit 13-a was a large map similar to Exhibit 13.

Exhibit 14 was withdrawn.

Government's Exhibit 15

Minutes of a meeting of the Board of Directors held in the offices of the Board on Wednesday, May 17th, 1939 at 10:00 A. M.

Present: Messrs. Murray, Smith, Taylor, Phillips, Ellis, Spruce, Donnelly, Koones, Humphries, Linkins and Herbert.

Absent: Messrs. Miller, Dodge, Tompkins and Saul.

Minutes of meeting held April 19th read and approved.

Financial statement for the month of April read and ordered filed.

President Murray reported that Thos. E. Hampton was unable to serve as Chairman of the Suburban Brokers Committee and the appointment of Curtis Walker was suggested.

Report on activities of the Executive Committee:

Bills amounting to $248.01 approved.

Authorized Secretary to attend the Atlantic City Conference and appropriated $100.00 for expenses.

Authorized continuation of contract with Stone's Mercantile Agency at a cost of $25.00. (Included in budget.)

Report that Property Management Committee had decided to make apartment vacancy survey in November only.

Report that there were 31 paid enrollments for the Management and Sales Conferences producing a revenue of $77.50, the total cost of the Conferences being $80.00

MEMBERSHIP CHANGES

The following were elected to active membership:

Myron Davy, 3399 Benning Rd., N. E., endorsed by F. Moran McConihe.

D. C. Developing Co., Inc., 1512 K St., N. W., endorsed by A. C. Houghton.

North Washington Housing Corp., 7990 Georgia Avenue, Silver Spring, Md., endorsed by F. A. Murray.

The following associate memberships were automatically cancelled as they are no longer connected with an active member:

D. C. Stutler	Horace Littlefield
William P. Parramore	Ernest W. Farley.

XII.

DEFINITIONS

(A) *Gross Lease:*

A gross lease is one in which the lessor agrees to pay all charges against the property leased which are normally incurred through ownership.

(B) *Net Lease:*

A net lease is one in which the lessee assumes payment of all property charges including taxes, insurance, maintenance, water, rents, and repairs.

(C) *Percentage Lease:*

A percentage lease is one in which payment is measured by or dependent on the gross business in dollars transacted by the lessee through the use of the property.

The term "Gross Sales" as used and referred to in all percentage leases shall include all sales of merchandise and/or performance of any service for any customer or patron made by the lessee, lessee's employees, sub-tenant, or the lessee, or anyone whomsoever working in, out, through or from the demised premises, less credits for returned merchandise.

(D) *Management:*

Management, as used herein, includes the making of collections, the keeping of accounts, the renting, leasing and operation of a property.

(E) *City Property:*

City property is property consisting of or located on platted land which is within or contiguous to a municipality.

1554 XIII.

DIVISION OF COMMISSIONS

(A) No real estate, loan, insurance, building, rental or other commissions shall be prorated or divided with any but agents who are members of the National Association of Real Estate Boards.

(B) An agency which manages, collects, rents, or holds exclusive rights, shall receive not less than 20% of gross commissions to cover overhead or

1546 John T. Meany was selected Chairman of the Arbitration Committee to succeed the late James P. Schick, and J. Garrett Beitzell was named to fill the vacancy caused by the promotion of Mr. Meany to the Chairmanship.

The following Resolution was adopted:

WHEREAS, The Washington Real Estate Board has learned with keen regret of the passing of their fellow member and associate

JAMES PETER SCHICK

AND WHEREAS, his wholehearted support in the work of the Washington Real Estate Board resulted in his appointment as Executive Secretary from December 1925 until April, 1928, and his election as Vice-President from October, 1932 until September, 1933, and

WHEREAS, his genial disposition and splendid personality endeared him to the members of this Board and to all those with whom he came in contact, and

WHEREAS, his passing is a distinct loss to the real estate profession and the National Capital,

NOW THEREFORE BE IT RESOLVED that the Board of Directors in meeting assembled hereby formally expresses its sense of loss in the passing of their friend and fellow worker, and

BE IT FURTHER RESOLVED that these resolutions be spread upon the minutes of this meeting and copy of same be sent to the family of the deceased.

The Chair called attention to the report on the study of advertising which was made and following a general discussion it was decided that the matter should be referred to the Committee on Education and they should cooperate with members of the Arlington-Alexandria-Fairfax Real Estate Board in trying to work out some method of publicizing the advantages of dealing with a Realtor.

The Chair stated that at the Regional Conference, Arthur W. Binns, Philadelphia Realtor, made an interesting talk on the rehabilitation of blighted areas and he had invited Mr. Binns to make the same address before members of the Board. The Chair was authorized to make the necessary arrangements and reimburse Mr. Binns for any expense.

Chairman Smith of the Commission Study Committee reported that the Committee had recommended that no action be taken in connection with the study of existing commission schedules until such time as the Washington Real Es-

consideration received, but in no event shall this amount exceed the sale commission to which the Realtor would have been entitled had the option been exercised.

(B) If a Realtor is engaged by a prospective purchaser to secure options for which only a nominal consideration or none is paid, the Realtor shall have an agreement in advance for compensation by the prospective purchaser, and he shall charge compensation accordingly whether the options are exercised or not.

XXII.

Sales Commissions and Rules

All commissions shall be based on total values or sales prices of property, and not on equities or partial payments.

(A) *City Property*

Commissions on the sale of improved or vacant property shall be:
5% on first $50,000
3% on next $450,000
2% on balance;
Minimum charge $50.

(B) *Subdivisions*

Charges on subdivision sales shall be a matter of contract. Generally, all expenses of surveying, developing, advertising, etc., shall be borne by the owner.

(C) *Leaseholds*

For the selling of leaseholds, the charge for the unexpired term of the lease shall be the rates provided in Section XVIII, as if for a new lease for a like period, plus 5% of any cash or other consideration paid by the purchaser of the leasehold.

(D) *Special Effort Property, Farms and Unplatted Land*

10% on first $5,000.
5% on balance.

(E) *Factory Properties*

Same as (A)

(F) *Auction Sales*

See "Auction Fees".

listing and management fees. The balance shall be divided equally among the agencies acting as brokers. This rule shall apply to rentals and leases, but not to cash settlements of leases.

XIV.

EXCHANGE OF REAL ESTATE

(A) The same commissions, rules and customs as apply to sales shall apply to exchanges. Commissions shall be paid by each owner, based on the price of each property as stated in the exchange, or on the actual value of each property.

XV.

EXPERT TESTIMONY AND OPINIONS

(A) Charges for expert testimony and for opinions shall be made according to the extent of services rendered, but shall in no case be less than $50 for each day or part thereof. This charge is to be made whether spent in Court, in private hearing, investigation, or research. In the case of properties valued at $100,000 or more, Realtors shall establish higher fees in advance of consulting with the Courts, the Attorneys or the principals.

(B) In case expert testimony or an opinion involves a valuation, appraisal fees as in the appraisal schedule shall be charged.

(C) Members of a Board appraisal committee, requested to give expert testimony in courts, or otherwise, to *substantiate* appraisals made by such committee shall under no conditions act in this capacity, unless they are directed to do so by the Real Estate Board; unless a brief of the appraisal in question is submitted; and unless they are assured of compensation for this service.

XVI.

INSPECTION FEES *(Condition Reports, etc.)*

(A) The charges for inspections shall be in accordance with advance agreement.

XVII.

INSURANCE

(A) *Fire, Liability, Etc.*

If a Realtor operates an Insurance Department, or has insurance brokerage connections, he shall

1559 (G) *Furnished Properties, Fixtures, Stock, etc.*
See Section XVIII, Paragraph "I"

(H) *Earnest Money*

Earnest money shall be held by the agent, and shall be approximately 5% of the selling price. If forfeited by the purchaser on cancellation of contract, earnest money shall be divided equally between broker and seller.

(I) *Clearing Title*

Costs involved in perfecting title shall be borne by the seller, or the borrower, unless otherwise agreed.

(J) *Gross Price*

A price given to an agent by an owner shall be presumed to be gross and the agent shall charge the regular commission on such price.

(K) *Net Price*

The acceptance of net listings by Realtors is prohibited.

(L) *Duration of Price*

Unless a price is withdrawn in writing by the owner, a quotation of price shall be presumed to be binding for 30 days.

(M) *When Commission Earned*

A commission shall be earned by the agent, and shall be due and payable when the agent secures a purchaser who is accepted by the seller, the *prima facie* evidence of consummation being the signing of the contract and the deposit of the earnest money. Imperfections of title shall not affect liability of a client for commissions.

(N) *Commissions Payable in Cash*

All commissions shall be payable in cash, or in something readily convertible into cash. No transaction shall be handled by an agent if the commission be contingent on another sale or lease.

XXIII.

Tax Adjustments or Reductions

For assembling and preparing data on tax adjustments or reductions and for appearing before the necessary taxing authority, courts, or other tribunals, the Realtor's charge shall be based on the first year's savings.

tate Board is in receipt of the recommendations of the Committee on Rules, Rates and Customs, after their approval by the National Association of Real Estate Boards. Upon motion of Mr. Taylor, seconded by Mr. Herbert, the report of the Committee was unanimously adopted.

Secretary read a communication from Commissioner Hazen relative to having a speaker appear before our group to discuss the new pedestrian control laws. It was felt that in view of the fact that no regular meeting of the Board would be held in the near future it would not be possible to have a speaker.

1547 Report on the License Law amendments was made to the effect that Board Counsel Whiteford was contacting Chairman McGehee of the sub-committee relative to revising the pending bill and that the President and Secretary had advised members of Congress and Counsel that elimination of the section pertaining to cemetery lots would be approved by the Board.

Secretary reported that the Program Committee had recommended that it be permitted to place into a separate account any surplus that might accrue from Board functions, such as the Outing, Dinner Dance and Christmas Party. It was suggested that this be permitted but that any sum over $200.00 should be credited to the Board's profit and loss account. This was agreed to by a vote of 10 to 1.

Adjournment.

Respectfully submitted:

CHAS. J. RUSH
Executive Secretary

Approved:
FRANCIS A. MURRAY
President

1560 *Government's Exhibit 17*

NATIONAL ASSOCIATION
OF REAL ESTATE BOARDS

June 16, 1941

Mr. Chas. J. Rush, Ex. Secretary
Washington Real Estate Board, Inc.
1417 K Street, N. W.
Washington, D. C.

Dear Mr. Rush:

We enclose two copies of the guide on commission rates, rules, and customs, prepared by the National Committee on this subject. We would appreciate your Board referring this schedule to some committee or officer interested in the matter of commissions who could compare it with your schedule, definitions, and customs and give us the benefit of your comments and advice. If this guide is out of line in any important point with your own practice, will you please advise us? If you think the guide would be an improvement on your present practice, will you also let us know this fact?

It is the purpose of our Committee this year to try to perfect our guide and to bring the matter of improvement of local Board schedules before the delegates at the Detroit Convention in November. Recent experiences with Government agencies and with important fiduciary institutions lead your Committee to feel that this subject is exceedingly timely and that much good could be accomplished if our Member Boards could agree on certain basic definitions and procedures such as suggested in the guide.

In order to make reference to any particular section easier, we have arranged the guide on an alphabetical basis. In commenting on any particular item, it would save time if references were made to the point in question by number and letter.

Your National Committee would also appreciate knowing whether your Board has recently revised its schedule and whether the guide has been helpful in this process.

It would be appreciated if you would respond to this letter within the next two or three weeks. Please send your replies c/o headquarters office, 22 West Monroe Street, Chicago.

Yours very truly,

BOYD T. BARNARD

Boyd T. Barnard, *Chairman*
Committee on Rates, Rules, and Customs

BTB:RJ
Encs.

1561 *Government's Exhibit 17a*

GUIDE
ON
RATES,
RULES
AND
CUSTOMS

NATIONAL ASSOCIATION
OF REAL ESTATE BOARDS

22 WEST MONROE ST. CHICAGO, ILL.

1563 I. ADVERTISING (Sales, Rentals or Exchanges)

A. When property is priced at a rentable or a salable figure, the agent may advertise such listed properties at his own expense. Mere listing or placing of properties with an agent does not impose an obligation upon the agent to advertise at his own expense.

B. Agent shall charge owner with expenses of advertising, circularizing, etc., unless there is an agreement to the contrary. Owner shall have the right to limit or to control such expenses, the agent being advised in advance by the owner as to the limit or the amount of such expenditure.

II. ADVISORY SERVICES AND ANALYSES

A. Charges for advisory service such as analyses and studies of property shall be by special arrangement and shall be commensurate with the importance of the subject matter and the time required.

III. APPRAISAL FEES

A. Realtors should not give unconsidered opinions as to the value of property.

B. The fees charged should be based upon the work involved. Properties involving complicated questions and situations requiring detailed written reports, in order that the methods of arriving at values and conclusions thereto can be properly set forth, must, of necessity, be charged for on a different basis from ordinary appraisals.

C. The fees for appraising property classified as *business, commercial, or industrial*, and appraisals for subdivision property as well as all *properties located*

outside the city limits shall be quoted upon request. Such fees shall not be less than those stated below.

D. Except where the appraiser acts as a duly
1564 appointed representative of loan companies, banks, or others having a volume of business, which concerns ordinarily furnish their own report forms, and for whom services may not be covered by an agreement and/or contract, the charge shall be not less than:

$2.00 per $1,000 up to $500,000.
$1.00 per $1,000 beyond $500,000.
Minimum fee of $25.00.

E. In addition to the appraisal fee, the appraiser will charge expenses for blue prints, surveying, photographs, etc., and for transportation to and from any property located outside the city limits of .....

IV. Arbitration Fees—Division of Estates, Etc.,

A. Fees for arbitration, division of estates, etc., shall be the same as fees for expert testimony.

V. Auction Fees

A. Auction fees shall be determined by special agreement, but shall not be less than the established sales commission, plus the cost of advertising and all special service rendered,

VI. Building Restriction Adjustments

A. If a Realtor is required to gather facts and to appear before Planning and Zoning Commissions, or other such tribunals, a fee commensurate with the service rendered shall be charged. In no case shall the fee be less than $50 per day.

VII. Buying Real Estate

A. The same commission rates and rules as apply to sales shall apply to purchases; and agent may collect fee from purchaser if he is authorized in writing to buy property at public auction, forced sale, or private sale.

VIII. Consultant Representing Owner

A. If a Realtor acts as consultant and represents the owner in supervising income property managed by
1565 others, the fee shall be not less than 2½ per cent of the gross rentals of the property; minimum charge $1.50 per year.

IX. Exchange of Real Estate

The same commissions, rules, and customs as apply to sales shall apply to exchanges. Commissions shall be paid by each owner and shall be stated in the exchange contract.

X. Expert Testimony and Opinions

A. Charges for expert testimony and for opinions shall be made according to the extent of services rendered, but shall in no case be less that $50 for each day or part thereof. This charge is to be made whether spent in court, in private hearing, investigation, or research.

B. In case expert testimony or an opinion involves a valuation, appraisal fees as set forth in the appraisal schedule shall be charged.

C. Members of a board appraisal committee requested to give expert testimony in courts, or otherwise, to *substantiate* appraisals made by such committee, shall under no conditions act in this capacity unless they are directed to do so by the real estate board, unless a brief of the appraisal in question is submitted, and unless they are assured of compensation for this service.

XI. Inspection Fees (Physical Condition Reports, etc.)

A. The charges for inspections shall be in accordance with advance agreement.

XII. Leasing and Renting

A. *Definition*

1. *Gross Lease:*

A gross lease is one in which the lessor agrees to pay all charges against the property leased which are normally incurred through ownership.

2. *Net Lease:*

A net lease is one in which the lessee assumes pay-
1566 ment of all property charges including rents, taxes, insurance, maintenance, water, and repairs.

3. *Percentage Leases:*

A percentage lease is one in which payment is measured in full, or in part, or is dependent on the gross business in dollars transacted by the lessee through the use of the property. The term "gross sales" as used and referred to in all percentage leases shall

include all sales of merchandise and or performance of any service for any customer or patron made by the lessee, lessee's employees, sub-tenant, or the lessee, or anyone whomisoever working in, out, through, or from the demised premises, less credits for returned merchandise.

B. Gross and Net Leases:

The charge shall be not less than 5 per cent for the first five years; 3 per cent for the next five years; 2 per cent beyond. Maximum of one average year's rental.

C. Month-to-Month Tenancies:

Charge not less than one half of first month's rental.

D. Renewal or Extension of Leases:

In any lease giving the lessee an option or privilege to renew or extend said lease and where lessee exercises the option or privilege, and/or where lessee remains in the premises beyond the time specified in the original lease, the lessor is to pay the agent a commission on the extended period on whatever rental or terms then agreed upon between the lessor and lessee at the regular commission rate based on the date of the original lease. The commission is to be paid in cash at the time of renewal or extension.

Broker shall obtain agreement, protecting himself in this respect. If lease contains clause permitting cancellation, agent shall charge for the actual term of the lease, not including the period covered by cancellation. If lessee continues the lease, it shall be treated as in the preceding paragraph.

1567 *E. Percentage Leases*

1. Minimum Guarantee Percentage Leases:

When a percentage lease having a fixed minimum guarantee has been consummated, the broker shall charge upon the same basis as though the minimum guaranteed rental were a fixed straight rental as provided in paragraph "*B*" above, the charge being due and payable immediately upon the closing of the lease.

In addition to this charge based upon application of percentage as provided in the preceding paragraph, the broker shall charge 2 per cent on all overplus payments paid to lessor by lessee during the demised term.

2. No Minimum Guarantee Percentage Lease:

Where no minimum guarantee is specified in the lease, commission shall be computed as if the lease contained a minimum rent of 75 per cent of owner's asking price. The foregoing provision (1 above) applicable to lease with minimum guaranteed rental shall then apply.

F. Privilege of Purchase

If a lease contains an option to purchase, the agent shall collect the regular leasing commission and in addition shall have a written agreement from the lessor agreeing to pay a full sale commission in the event the property is sold under the option rights in the lease.

G. New Building and Improvements Added Under Lease

If buildings are to be erected on ground involved in a lease, or additions are to be made to already existing improvements, all to be done by lessee, the value of such added buildings or improvements is to be considered as added value to rent, and the agent shall add the value of such improvements to rental and charge according to the lease schedule.

H. Cancellation of Leases

1568 If an agent procures a cancellation of a lease, the regular rental commission shall be charged and applied to what would have been the total of the lease had it run to its conclusion, the commission to be paid by the party whom the agent represents, or according to advance agreement.

I. Leasing Furnished Property

The charge for leasing furnished property shall be the regular commission on the amount received for both building and contents. (Lessor shall furnish inventory if required.)

J. Sub-Leasing

An agent shall handle each lease or sub-lease as a new transaction and shall charge the established rental commission on total gross rent. In case of a long-term unexpired lease, the agent has the option to accept his commission as the monthly rentals are paid.

K. Withdrawals

If property is withdrawn from an agent prior to the expiration of the term created in lease, the agent shall

be entitled to the full commission on the unexpired term.

L. When Commission Earned

A commission on a lease is earned and payable when, through the agency of the broker, the minds of lessor and lessee have met on the terms of the lease as evidenced by a cash deposit or written agreement.

M. Agricultural Leases

The commission for leasing agricultural property shall be not less than 5 per cent of the total rent. If the lease is on a crop-sharing basis, the commission shall be computed upon the estimated cash rental value of the real property at the time the lease is closed. If the agent elects to collect the commission when the crop share is received by the lessor, the commission shall be not less than 5 per cent of the lessor's share of the gross rental.

XIII. Loan Commissions

A. For negotiating first mortgage loans, the commission shall be not less than 2 per cent of the amount of
1569 the loan on all property where loan is for not more than three years and not less than 3 per cent of the amount of the loan on all property where loan is for three years or more.

B. For negotiating second mortgage loans the commission charged shall be fixed by agreement but shall not be less than that for first mortgage loans.

C. For negotiating construction loans, the commission shall be not less than 5 per cent of the gross amount of the loan.

D. For negotiating renewals, the commission shall be the full loan commission.

E. The minimum commission for negotiating any loan shall be $25.

F. Commissions are net to the broker, and borrowers shall pay other fees and costs.

G. Agents representing building and loan associations, mortgage companies, and insurance companies, may deviate from the above schedule when it is necessary in order to conform to the rules of the company.

H. When agent must travel an unusual distance, for instance, on grain ranch or stock ranch loans, he shall charge according to the distance away and other conditions involved.

XIV. Management of Property

A. Definitions

Management, as used herein, includes the making of collections, the keeping of accounts, the renting, leasing, and operation of property.

B. Commissions

The charge for management of property shall be the regular commission for negotiating sales, rentals, leases, or renewals, plus the following:

Business Property

Not less than 5 per cent on the gross annual income. Minimum charges to be $3 per tenant unit managed.

In case of commercial property with annual gross rental in excess of $100,000, if the managing agent
1570 enters into a contract for one year or more, the cost of management service may be determined by special agreement.

Residential Property

Not less than 5 per cent on all collections and the minimum total charge shall be $3 per month for each family or other unit of occupancy. Where weekly collects from tenants must be made, the charge shall be not less than 10 per cent, with a minimum total charge of $5 per month for each family or unit.

C. Supervision of Repairs and/or Remodeling

On all repairs handled through the agent's office, the following schedule of charges shall be made: up to and including $2,000, 5 per cent; over $2,000, charges to be made in accordance with service rendered.

D. Termination

When a management contract or agreement is terminated, the managing agent shall charge regular commissions on the unexpired terms of all leases and renewals negotiated by him during the period of such contract.

XV. Options to Buy Property—Where Secured by Realtor

A. If a consideration, cash or otherwise, has been paid for an option arranged by a Realtor and the option is not exercised, the Realtor shall charge the principal granting the option one half of the consideration received, but in no event shall this amount ex-

without charge, services which the public has never received before; namely, advice, guidance, and in many cases physical effort, in the compliance with the Rent Control Act and the Fuel Oil Rationing Act.

"Lastly, we submit there is no legitimate reason why the commission rates in Washington, D. C., which has been well described as the Capital of the World, should not be comparable to those rates charged by other large cities, the rates of which are shown below:

Philadelphia	5% straight—no ceiling.
St. Paul	5% straight—no ceiling.
Syracuse, N. Y.	5% straight—8% beyond 7 miles from center of city.
Chicago	5% to $100,000.—3% above.
Kansas City	5% to $100,000.—3% above.
Columbus, Ohio	5% to $100,000.—4% above.

"It will be noted that the suggested change, eliminates the theoretical boundary line but at the same time fixes the District of Columbia rate a great deal more favorable to the property owner than in any city above named."

The subject was generally discussed as well as the
1581 proposed $50,000. ceiling. An amendment was offered by Mr. Breuninger to the motion of Mr. McConihe for the adoption of the report providing for a $25,000. ceiling but this was rejected by a majority vote. The motion providing for a 4% overall rate died for want of a second. During the discussion, it was suggested that the Board should make a study of services performed by members for which they are not now being compensated. The motion offered by Mr. McConihe and seconded by Mr. Hohenstein providing for adoption of the report of the Brokers' Committee was then unanimously approved.

Secretary stated that the Board's rules "Article 14" and "Article 17" provide that a written notice be mailed to every active member at least 10 days prior to the meeting, said notice to contain the substance of the proposed amendment, and that said notice would be sent without delay.

Secretary reported that Frank J. Luchs was being commissioned an Ensign in the U. S. Navy and therefore would have to relinquish the Chairmanship of the Business Property Leasing Committee. Raymond M. Taylor of Shannon & Luchs was named to succeed Mr. Luchs and it was suggested that Carey Winston be named to succeed Mr. Streng on the same committee.

Lansing Valk and Frank S. Phillips were added to the members of the Brokers Committee upon the recommendation of Chairman Sandoz.

The Secretary reported on the status of rent control legislation pending before Congress and also on the cooperation of members with the War Housing Center in obtaining accommodations for members of Congress.

There being no further business, the meeting adjourned.

Respectfully submitted,

CHAS. J. RUSH
Executive Secretary

Approved
ALAN P. LIVINGSTON
President

1582 *Government's Exhibit 21*

SPECIAL BULLETIN

WASHINGTON REAL ESTATE BOARD
1417 K Street, N. W.

February 17, 1943

Placing the entire District of Columbia into one commission-zone was accomplished this week when members of the Washington Real Estate Board formally agreed to the elimination of the two commission boundary zones which have been in existence for more than 20 years. The changes were adopted February 16, 1943.

Adjustments were made in the existing commission schedule placing a minimum rate of five per cent on property valued up to and including $50,000.00 and a three per cent rate on the value in excess of $50,000.00. This amounts to an equalization for the entire District of Columbia and will aid in eliminating the many misunderstandings which have come up through lack of definite information as to the dividing lines in the former commission zones. No changes were made in the schedule applying to properties located in the Maryland Metropolitan area which is under the jurisdiction of the Washington Real Estate Board.

The modified commission schedule on *Sales* and *Exchanges* are as follows:

SALES

The minimum commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up

ceed the sale commission to which the Realtor would have been entitled had the option been exercised.

B. If a Realtor is engaged by a prospective purchaser to secure options, the Realtor shall have an agreement in advance for compensation by the prospective purchaser, and he shall charge compensation accordingly, whether the options are exercised or not.

XVI. Sales Commissions and Rules

All commissions shall be based on total values or sales prices of property and not on equities or partial payments.

1571 A. *City Property:*

(Consisting of or located on land which is within or contiguous to a municipality.)

Commissions on the sale of improved or vacant property shall be not less than:

5% on the first $100,000
3% on the next $400,000
2% on the balance
Minimum charge $50 vacant
$100 improved.

B. Subdivisions:

Charges on subdivision sales shall be a matter of contract. Generally, all expenses of surveying, developing, advertising, etc., shall be borne by the owner.

C. Leaseholds:

For the selling of leaseholds, the charge for the unexpired term of the lease shall be the rates provided in Section XII, as if for a new lease for a like period, plus 5 per cent of any cash or other consideration paid by the purchaser of the leasehold.

D. Special Effort Property; Farms, and Unplatted Land:

Not less than 10% on the first $5,000
5% on balance
Minimum $200.

E. Industrial Properties:

Straight 5 per cent. Charges for special services in connection with the sale of industrial property, such as traffic and trade area surveys and engineering service, shall be by agreement.

F. Auction Sales:

See "Auction Fees."

G. Earnest Money:

Earnest money shall be approximately 10 per cent of the selling price.

If forfeited by the purchaser on cancellation of contract, earnest money shall be divided equally between broker and seller.

H. Clearing Title:

Costs involved in perfecting title shall be borne by the seller, or the borrower, unless otherwise agreed.

1572 *I. Gross Price:*

A price given to an agent by an owner shall be presumed to be gross and the agent shall charge the regular commission on such price.

J. Net Price:

The acceptance of net listings by Realtors is prohibited except in case of options.

K. When Commission Earned:

A commission on a sale is earned and payable when, through the agency of the broker, the minds of seller and buyer have met on the terms of the sale, as evidenced by a cash deposit or written agreement.

XVII. Tax Adjustments or Reductions

A. For assembling and preparing data on tax adjustments or reductions and for appearing before the necessary taxing authority, courts, or other tribunal, the Relator's charge shall be not less than 25 per cent of the first year's savings.

* * * * *

Committee on Rates, Rules and Customs

1941

Boyd T. Barnard, Philadelphia, *Chairman*
William H. Pitts, Birmingham, Ala.
H. H. Maschmeyer, Mobile, Ala.
E. C. Conner, Little Rock, Ark.
Paul S. Bomberger, Modesto, Calif.
Geo. R. Morrison, Denver, Colo.
Amos G. Hewitt, New Haven, Conn.
H. Clifford Bangs, Washington, D. C.
Oscar E. Dooly, Jr., Miami, Fla.
Robert S. Carr, Orlando, Fla.
Robert R. Otis, Atlanta, Ga.
J. Clay Murphey, Macon, Ga.
Frank S. Slosson, Chicago, Ill.

Francis S. Keye, Rockford, Ill.
Russe H. Hartman, Indianapolis, Ind.
Harold Hobbs, Sr., Muncie, Ind.
James R. Leverett, Council Bluffs, Ia.
Nestor R. Weigand, Wichita, Kans.
J. Edw. McDonogh, Louisville, Ky.
1573 J. A. M. Wilson, New Orleans, La.
Willard B. Sweetser, Portland, Me.
S. J. Stackhouse, Baltimore, Md.
Wm. Pease O'Brien, Boston, Mass.
Charles F. Brown, Detroit, Mich.
Gerald F. Healy, Flint, Mich.
John W. Adams, Jr., Minneapolis, Minn.
Alton T. Ellick, Jackson, Miss.
Lewis T. Kitchen, Kansas City, Mo.
Charles A. Shaw, St. Louis, Mo.
John D. North, Billings, Mont.
H. S. Manville, Omaha, Nebr.
Erle G. Bishop, Peterborough, N. H.
Edward J. Maier, Newark, N. J.
A. N. Lockwood, Newton, N. J.
F. Durand Taylor, New York City, N. Y.
Roger W. Huntington, Waterville, N. Y.
R. P. Booth, Asheville, N. Car.
A. R. Ritzman, Akron, Ohio
Robert A. Cline, Cincinnati, Ohio
Chas. A. Braman, Cleveland, Ohio
H. E. Wilkins, Bartlesville, Okla.
Morris W. Turner, Tulsa, Okla.
N. C. Soule, Portland, Ore.
H. A. Noah, Pittsburgh, Pa.
E. Fred Kemner, Philadelphia, Pa.
J. F. Brownlow, Knoxville, Tenn.
W. S. Wagley, Abilene, Tex.
A. D. Foreman, Houston, Tex.
Manford A. Shaw, Salt Lake City, Utah
Donald C. Hancock, Richmond, Va.
Ernest J. Riley, Seattle, Wash.
Edward B. Kyle, Huntington, W. Va.
Glen A. Wilson, Milwaukee, Wis.

1574 *Government's Exhibit 18*

Minutes of meeting of Board of Directors, held in Board offices, Wednesday, January 20, 1943 at 10 A.M.

Present: Messrs. Livingston, Hillegeist, Breuninger, Bell, Stoever, Hohenstien, Karrick, McConihe, Walker, Koones, Phillips, Beitzell.

Absent: Messrs. Jarrell, Taylor, Berry.

Minutes of meeting of December 16 read and approved.

Financial statement for December submitted and ordered filed.

Report on activities of Executive Committee:

Approved payment of current bills totalling $1,844.34.

Invested $2,220.00 in three additional War Bonds, making a total of $7,400.00 now invested.

Authorized purchase of No. 4 Baist's Plat Book at $100.00.

Concurred in recommendation of Program Committee on cancelling annual dinner dance.

Recommended luncheon meeting for National President Willmore on February 12 at Board expense.

Board to cooperate in Red Cross campaign.

MEMBERSHIP CHANGES

Membership Committee submitted the application for Associate Membership of George P. Schultze, associated with and endorsed by J. Wesley Buchanan, subject to the usual notice to membership.

Place on Inactive List: Thomas H. Schaffert (Rust Co.) U. S. Army.
C. A. Metzler, Jr. U. S. Army.

Associate: Frank Paroni now an officer with District, Lawyers and Washington Title Insurance Companies.

Active: Secretary was authorized to drop the Active membership of Robert Gaylor as of October 1, 1942 as he is no longer active in real estate, and upon payment of delinquent dues show that he resigned while a member in good standing.

Secretary was authorized to drop the membership of George J. Moss as of October 1, 1942, and upon payment of delinquent dues show that he resigned while a member in good standing. (NOTE: Mr. Moss phoned he would remit and retain his membership.)

The membership of Walker and Prescott was transferred to Curtis Walker, the partnership having been severed. Secretary was instructed to contact Mr. Prescott and advise him that he would be eligible to continue membership by virtue of his former association.

1575

Secretary reported that George T. Walker expects to receive a commission in the United States Marines in the near future, and that he is turning over his business to Walker and Dunlop, and was authorized upon receipt of formal notice to place Mr. Walker's name on the inactive list.

With reference to the request from NAREB concerning the individual membership of Hardy W. Jacobs, Mr. Koones was named to make a special investigation and to submit a report concerning this application.

The Directors reiterated their previous stand on legislation amending the District of Columbia Unemployment Compensation law to provide for the "experience rating" plan.

Report made that the Executive Committee held on the charges filed by Sandoz, Inc., against W. C. & A. N. Miller Development Company and that they recommended that the Miller Company agree to an arbitration hearing. It was also brought out that the hearing was held Tuesday, January 19, 1943, the Miller Company having agreed to the arbitration.

The question of procedure in questions involving misunderstandings with members and their declination to agree to arbitration was discussed and the Chair was duly given authority to appoint a committee of three to review the Board's arbitration procedure and ascertain if any changes should be made.

The recommendation of the Brokers Committee relative to elimination of the commission boundary zone as follows was read by the Secretary:

"Your Brokers Committee, after due consideration, for the reasons cited below, respectfully suggests the elimination of the boundary line distinguishing "suburban" and "city area" insofar as payment of commission on the sale of real property is concerned, and recommends the adoption of a change in the commission schedule, as follows:

"~~The commission for the sale of all real~~ property in the District of Columbia and adjacent Metropolitan Area, shall be 5% on the first $50,000 of purchase price, and 3% on the amount above.

"The committee also recommends as an additional revision in the commission schedule the following:

"The minimum commission to be charged for the sale of real property shall be $100.00.

1576 "The Minimum Commission on all sales of real estate within the District of Columbia shall be five per cent of the sales price up to and including $50,000.00 and three per cent on the excess above $50,000.00, and in the adjacent Metropolitan area in Maryland shall be at a minimum of five per cent.

The Minimum Commission for any sale shall be $100.00."

The Chair put the question and the motion was unanimously adopted.

Modification of the Exchange Commission schedule were then considered and the following changes were duly approved:

"In the Exchange of real estate a commission shall be charged each owner at the rate of two and one-half percent of the exchange price of the lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of five per cent up to and including $50,000.00, and three per cent for the amount above $50,000.00 if located within the District of Columbia. Where the property is located in the Metropolitan area in Maryland the owner of the higher valued property shall be charged a commission of 5% on the excess, each party to the exchange paying 2½% on lower valued property."

It was brought out that where brokers operated in the Virginia area they would be guided by the commission schedules adopted by the Alexandria-Arlington-Fairfax Real Estate Board, as the WREB did not have jurisdiction over the Virginia area.

It was brought out that in Baltimore a commission up to ten per cent may be charged for the sale of waterfront and other suburban properties located more than 15 miles from the City Hall, if such agreement were entered into at time of listing.

There being no further business the meeting adjourned at 3:38 P. M.

1577 *Government's Exhibit 19*

Washington Real Estate Board
1417 K Street, N. W.

Important

January 22, 1943

SPECIAL NOTICE TO ALL ACTIVE MEMBERS:

In accordance with the action of the Board of Directors in adopting the enclosed report from the Brokers Committee, notice is hereby submitted in compliance with the By-laws, that a special meeting of Active members will be held on Tuesday, February 16, 1943, at 2:00 P. M. in the Ambassador Hotel for the purpose of considering changes in the Schedule of Commissions, as follows:

Under SALES: the proposed amendment would make this article read:

"THE COMMISSION ON ALL SALES OF REAL ESTATE WITHIN THE DISTRICT OF COLUMBIA AND ADJACENT METROPOLITAN AREA SHALL BE FIVE PER CENT OF THE SALES PRICE UP TO AND INCLUDING $50,000.00 AND THREE PER CENT ON THE EXCESS ABOVE $50,000.00.

"The Minimum Commission for any sale shall be $100.00.

Under EXCHANGES: the proposed amendment would make this article read:

"IN THE EXCHANGE OF REAL ESTATE A COMMISSION SHALL BE CHARGED EACH OWNER AT THIS RATE OF 2½% OF THE EXCHANGE PRICE OF THE LOWER VALUED PROPERTY, WITH AN ADDITIONAL CHARGE AGAINST THE OWNER OF THE HIGHER VALUED PROPERTY FOR THE EXCESS AT THE RATE OF 5% UP TO $50,000.00, AND 3% FOR THE AMOUNT ABOVE $50,000.00.

The section pertaining to the commission zone map would be eliminated.

The meeting will be open to Active Members. Each member office will be entitled to one vote as provided in the By-Laws. Members are respectfully requested to be present at Two o'clock, Tuesday, February 16, 1943. The meeting will be held in the EMPIRE ROOM, AMBASSADOR HOTEL.

BY DIRECTION OF THE BOARD OF DIRECTORS.

* * * * *

The Membership Committee submits the application of George P. Schultze for Associate Membership. He is associated with and endorsed by J. Wesley Buchanan. Members should submit any comments in writing to the Board office.

Respectfully,

CHAS. J. RUSH
Executive Secretary

CJR:R

1578 Memorandum of meeting of the Commission Study Committee held in the offices of the Board on Wednesday, March 8th, 1939 at 11:00 A. M.

Present: Chairman Smith, Messrs. Murray, Taylor, Homer Phillips, Dodge, Herbert and Koones.

Chairman Smith called upon Mr. Doyle, Chairman of the Brokers Committee, who was present with Messrs. Brodie,

Frank Phillips and Seitzell. Each member of the Brokers Committee presented their views in connection with the recommendations of the Committee for elimination of the two commission zones and the establishment of a rate of 5% on sales up to $25,000.00, citing increased overhead: that most building was in the straight 5% area; that it is harder to sell the old houses; that brokers are not getting paid enough for their services; that the difference in commission on the sale of $10,000.00 houses would only amount to $100.00; that owners of old houses want to sell and only one of 25 might question commission rate; that the brokers give much free services such as appraisals; that the average cost of advertising an old house is $75.00; that the H.O.L.C. spends 7% to sell their old houses, (2% override to its general agent); that 75% of the houses sold at under $10,000.00 are in the 5 and 3% area; that the suggested rate would place a limit upon the commissions in the outlying area which does not now exist; that it is worth at least as much to sell old houses in the downtown area as houses in the outlying sections; that the proposed rate would enable the brokers to give their clients better services and enable them to remain in the brokerage business.

Mr. Homer Phillips left at 11:25 and Mr. Dodge at 11:40.

Mr. Doyle summed up the statements made by members of the Committee and stated that the Committee took into consideration the interests of the builder, the financing groups as well as the public; that they did not want to lower the standards and that their action was not primarily to increase commissions; that every one must be in agreement as to the elimination of the two zones, so the question remained as to what is an equitable rate; that the Committee would be willing to consult further with the Commission, Study Committee.

Following their presentation Mr. Smith thanked the group and upon their departure the Committee went into executive session.

The Chair announced the appointment of Mr. Bangs as a member of the special committee. It was agreed that the Committee would meet on Tuesday, March 14th, 1939 at 10:00 A. M. and decide what course to follow. It was suggested that all angles of the question might be considered and that the brokers appeared to need help.

Adjournment.

1579 *Government's Exhibit 20*

Minutes of special meeting of the Washington Real Estate Board, held in the Ambassador Hotel, Tuesday, February 16, 1943 at 2 P. M.

Present: President Livingston, 1st Vice President Phillips, Wm. L. Beale, Edward R. Carr, Frank S. Phillips, L. T. Gravatte, Jos. A. Herbert, Jr., Frank M. Doyle, O. M. Walker, J. Lee Donnelly, J. B. Bowling, Chas. C. Koones, F. Eliot Middleton, Edward H. Brent, F. A. Murray, George R. Linkins, Wm. A. Hill, John H. Davidson, A. C. Houghton, B. H. McCeney, George Y. Worthington, 3rd, Thos. L. Phillips, Owen Hohenstein, E. H. Croxton, R. V. Marceron, F. W. Stoever, G. Calvert Bowie, Thos. D. Lewis, Gilliat & Co., Mrs. Chase (Laura Harlan Co.) Frances Powell Hill, J. Wesley Buchanan, J. Garrett Beitzell, A. Jasper Moore, Thos. W. Sandoz, C. H. Hillegeist, C. Allen Sherwin, Jack Hayes, L. F. Colbert, H. Glenn Phelps and others.

The Chair called the meeting to order at 2:15 P. M. stating that the Board of Directors had adopted the report of the Brokers Committee recommending that the present commission boundary zone be eliminated and that in compliance with their action the meeting had been called in order that the members could consider the proposed changes.

Mr. Sandoz, Chairman of the Brokers Committee was called upon to read the committee's report, which provided for the elimination of the commission boundary zone; the adjustment of the commission rate to provide for a commission of five per cent up to $50,000.00 and three per cent on the excess above $50,000.00 on all sales in the District of Columbia and adjacent Metropolitan area; a minimum sales commission of $100.00; and an adjustment in the exchange commission rates to conform.

After reading the report, Mr. Sandoz duly moved its adoption, which was seconded by Mr. McCeney. The subject was generally discussed, it being agreed that the boundary zones should be eliminated as being inequitable and unfair to owners of property located adjacent to the boundary lines which placed them in the higher rate area, as well as the cause of much confusion on the part of property owners and brokers.

Mr. Bowie offered an amendment to set the ceiling on the 5% rate at $25,000.00, which was seconded by Mr. Bowling but failed of passage.

The question of the effect of the amendments upon brokers operating in Maryland was discussed and the Secretary stated that under authority granted the WREB by the Directors of the National Association of Real Estate Boards, the local Board had jurisdiction over those portions of Montgomery and Prince George's Counties which were included in Washington's metropolitan area as established by the Census Bureau.

Motion offered by Mr. Thos. L. Phillips, seconded by Mr. Colbert, clarified the situation with reference to Maryland and continued the existing rate for that area, upon acceptance of the amendment.

The secretary then read the amended motion as follows:

1580 "Your committee submits that conditions have changed to such an extent since 1917 that the lower commission rate charged on property within the old 'city proper' area is unfair and inequitable, causes embarrassment and confusion among owners and brokers, and has in many cases caused bad feeling among owners, who, while not objecting to a 5% commission rate, see no reason why they should be charged more than their friend whose property might be a block or less away.

"We further submit that a broker's main stock in trade is his time, and that the sale of a 'downtown' property, except for possibly a few minutes in 'showing time', consumes the same amount of time and effort in completing the transaction through settlement as does the sale of a property in the outlying sections.

"Your committee mentions that which is common knowledge, namely the greatly increased costs of doing business, which costs have steadily increased over the years and give every indication of continuing to do so in the years to come.

"The real estate brokerage office operating on a fixed commission basis, is in the unenviable and unfair position of being forced to absorb itself all of these increased costs, and, while at present, there has been a good volume of business, we submit this condition is temporary, unusual, and cannot be relied upon to continue. Also, clients of brokerage offices are receiving,

to and including $50,000.00 and 3% on the excess above $50,000.00 and in the adjacent Metropolitan area in Maryland shall be at a minimum of 5%. The minimum commission for any sale shall be $100.00.

EXCHANGES —

In the exchange of real estate a commission shall be charged each owner at the rate of 2½% of the exchange price of the lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 5% up to and including $50,000.00 and 3% for the amount above $50,000.00 if located within the District of Columbia. Where the property is located in the Metropolitan area in Maryland, the owner of the higher valued property shall be charged a commission of 5% on the excess, each party to the exchange paying 2½% on lower valued property.

* * * * * * * * * * *

WASHINGTON'S BIRTHDAY, Monday, February 22, 1943 is a legal holiday. The Board of Directors recommend the observance of this national holiday by Realtors. The offices of the Board will be closed.

Respectfully,

CHAS. J. RUSH.
Executive Secretary

1583 *Government's Exhibit 22*

WASHINGTON REAL ESTATE BOARD
1417 K Street, N. W.

July 7, 1944.

SPECIAL NOTICE TO ACTIVE MEMBERS:

Several months ago the Board of Directors named a committee to study the rules, schedules and divisions of commissions of the Board in order to clarify those rules that appear to need clarification. This committee included A. Jasper Moore, Chairman of the Brokers Committee; G. Calvert Bowie, Chairman of the Mortgage and Finance Committee; Harvey L. Humphrey, Chairman of the Property Management Committee; Carey Winston, Chairman of the Business Property Leasing Committee, and the undersigned as General Chairman.

It was not contemplated that the existing commission rates should be increased, but it was the opinion of some members that they have been and are rendering special

forms of services for which there has been no established fee or charge, that certain of our schedules were not clear and that there was a need at the present time for certain changes under the division of commissions schedule.

Meetings have been held by the various committees under the direction of their respective chairmen, and after a full committee meeting, the following recommendations were submitted:

REVISE RULE 1, DIVISION OF COMMISSIONS, to read as follows:

"THE SELLING OFFICE SHALL BE ENTITLED TO SIXTY (60) PER CENT OF THE TOTAL COMMISSION ON ALL SALES OF REAL ESTATE WHERE THE TOTAL SALE PRICE IS NOT IN EXCESS OF $30,000.00."

This would eliminate the section where salesmen were involved and eliminate many cases of misunderstanding between brokers. The present Rule 1 provides for a ⅔ division to the selling office and ⅓ to the listing office on sales not over $30,000.00, provided the selling office receives the listing direct from the listing office and not through a salesman in the listing office. However, where a salesman is involved in the listing office, the commission should be equally divided". No change would be made in Paragraphs 2 and 3.

REVISE RULE 8, DIVISION OF COMMISSIONS, to read as follows:

"WHERE ONE BROKER COLLECTS THE RENT OR MANAGES THE PROPERTY THE BROKER SECURING THE TENANT SHALL NOT PARTICIPATE IN THE COMMISSION ON THE RENEWAL OF ANY LEASE WHETHER OR NOT THE ORIGINAL LEASE CONTAINS AN OPTION FOR SUCH RENEWAL UNLESS UPON SPECIAL AGREEMENT."

Rule 14 provides for renewal commission upon special agreement and it was the opinion of the Business Property Leasing Committee that Rule 7 should contain a similar clause.

REVISE PARAGRAPHS 7, 8, and 9, SCHEDULE OF COMMISSIONS by consolidating them and making the new paragraph read as follows:

1584 Special Notice to Active Members—page 2

LEASES:	
First year	5%
Up to 21 years	2½%
Next 21 years	1%
Next 21 years	½%
Any period beyond	¼%

Recommended by the Business Property Leasing Committee.

REVISE RULE 25, SCHEDULE OF COMMISSIONS to read as follows:

"WHEN COLLECTION OF RENTS OR MANAGEMENT OF PROPERTY, EXCEPTING APARTMENT HOUSES, IS WITHDRAWN FROM BROKER, HE SHALL BE PAID IN CASH IN ADDITION TO THE COMMISSION HE HAS ALREADY COLLECTED, AS FOLLOWS:

"(a) In cases of monthly tenancies or where term is for one year or less, broker shall be paid a SUM WHICH WHEN ADDED TO COMMISSIONS ALREADY COLLECTED SHALL EQUAL ONE-HALF MONTH'S RENT.

"(b) For leases exceeding one year broker shall be paid in cash a commission of 2½% per cent of the gross rent for balance of the lease."

Proposed changes are shown in large type.

The foregoing changes were recommended by the Property Management Committee and, if approved, would make rules 25 and 26 in harmony with each other. This rule would restore the former Rule which was changed in 1934.

The Mortgage and Finance Committee recommends that no changes be made in the existing schedules in view of the unsettled condition in the loan field.

These recommendations were submitted to the Board of Directors, but it was their opinion that our committee did not go far enough in clearing up some of the ambiguous sections, so the whole matter has been referred back to the committee.

For the above reason our committee is now calling upon you for your suggestions. Will you look over the enclosed schedule of commissions and the rules on the division of commissions, giving consideration to the various recommendations made by the committee, and then forward us your recommendations? Bear in mind that we are not endeavoring to increase the rates, but wish to make our schedules fair and equitable to our clients, and at the same time see that the broker or agent receives fair compensation for his skill, experience and services. Of equal importance is the matter of equitable division of commissions among our members where more than one broker participates in the transaction.

As soon as your recommendations are received they will be considered by the entire committee in order that we may be in a position to submit a simple and easily interpreted

schedule for the consideration of the membership at the annual meeting late in September. In view of this will you kindly give our committee the benefit of your suggestions at the earliest possible date?

Sincerely yours,

F. A. MURRAY
Francis A. Murray, *Chairman.*

1585 *Government's Exhibit 23*

WASHINGTON REAL ESTATE BOARD
1417 K Street, N. W.

December 5, 1944

SPECIAL NOTICE TO ACTIVE MEMBERS:

Notice is hereby given that a special meeting of Active members of the Washington Real Estate Board is being called by the Board of Directors to consider changes in the Schedule of Commissions and in the rules for the Division of Commissions.

The meeting will be held on Tuesday, December 19, 1944 at 2:30 P. M. in the Empire Room of the Ambassador Hotel. Each member office is entitled to one vote in accordance with the By-Laws.

Enclosed with this notice is a copy of the changes, which were recommended to the Board of Directors by the special committee, which made a study of recommendations made by the Brokers, Business Property Leasing, Property Management and Mortgage and Finance Committees, as well as those submitted by members in response to the committee's request under date of July 7, 1944. A copy of the present schedule was sent you at that time.

Members are respectfully requested to give consideration to the proposed changes and if they have any recommendations to make to send them to the Board office for the attention of the special committee, which includes Francis A. Murray, G. Calvert Bowie, Harvey L. Humphrey, A. Jasper Moore and Carey Winston.

The committee advises that no changes in the established sales or rental commissions are being recommended but that certain modifications are being submitted in order to try and eliminate any language that may not be clear. No changes are being made in the Mortgage Loan rates. Modifications are being suggested in Long Term Lease rates; clarification of the "Option to Renew" section; also a revision of the Property Management schedule when rentals,

other than apartments, are withdrawn from the broker and the inclusion of a schedule for special services.

The committee also submits two changes in the rules covering Division of Commissions. It is proposed that Rule 1 be changed, placing the division between co-operating Realtors at 60% to the selling office and 40% to the listing office and eliminating the sentence pertaining to where a salesman is involved. It also proposed that Rule 8, Division of Commission be modified to conform to Rule 14.

You are respectfully requested to send in your recommendations in order that the committee may give them full consideration by the time of the meeting on December 19th and to be present at the meeting.

Respectfully yours,

CHAS. J. RUSH
Executive Secretary

1586 COMMISSIONS AND CHARGES

SCHEDULE OF COMMISSIONS AND FEES ADOPTED BY THE WASHINGTON REAL ESTATE BOARD AS STANDARD FOR ITS MEMBERS

NOTE:—All proposed changes are capitalized.

SECTION 1

Sales

1.—The STANDARD commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000. and 3% on the excess above $50,000.

2.—In the adjacent Metropolitan area in Maryland, UNDER THE JURISDICTION OF THE BOARD, the rate shall be 5% of the total sales price.

3.—WHERE THE PROPERTY IS LOCATED IN AN AREA WHICH IS MORE THAN 20 MILES FROM THE ZERO MILESTONE THE RATE MAY BE INCREASED TO NOT MORE THAN 10% IF SUCH RATE IS AGREED UPON AT THE TIME PROPERTY IS LISTED.

4.—The mimium commission on sales of property shall be $100. WHEN PROPERTY IS UNIMPROVED AND THE SALES PRICE IS LESS THAN $1,000., THE AMOUNT OF THE COMMISSION CHARGED SHALL BE BY AGREEMENT, NOT TO EXCEED $100. ALL COMMISSION SHALL BE BASED ON TOTAL VALUE OR SALES PRICES OF PROPERTIES AND NOT ON EQUITIES OR PARTIAL PAYMENTS.

5.—For Purchasing Real Estate the Commission Shall be the Same as for Selling.

6.—When Property is Priced at a Salable Figure the Realtor May Advertise Such Listed Properties at His Own Expenses, However, the Mere Listing or Placing of Properties With a Realtor Does Not Impose an Obligation Upon Him to Advertise at His Own Expense.

7.—The Act of Congress Creating the District of Columbia Real Estate Commission Requires All Brokers and Salesmen to Obtain the Written Consent of the Owner or His Authorized Agent Before They May Offer the Property for Sale or for Rent.

8.—Written Consent is Also Required Before a Sign May be Placed on any Property Within the District of Columbia.

Section 2

Exchanges

1.—In the exchange of real estate within the District of Columbia, a commission shall be charged each owner, at the rate of 2½% of the exchange price of lower-valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 5% up to and including $50,000. and 3% for the amount above $50,000. if located within the District of Columbia.

2.—When the property is located in the Metropolitan area in Maryland, the owner of the higher-valued property shall be charged a commission of 5% on the excess, each party to the exchange paying 2½% on the lower valued property.

3.—Where a Property is Located Beyond the 20-Mile Area, the Commission Shall be Subject to Agreement.

4.—The minimum commission for any exchange shall be $100. from each side.

Section 3

Leases-Business Property

For negotiating and making leases where rents are not collected by the broker and property is not under his management, and there is no managing agent, charges shall be made as follows:

1.—Monthly tenancy: One-half of first month's rent.

2.—Leases: One Year: 5%

1587 3.—Leases—Term: First year 5%
Next 20 years 2½%
Next 21 years 1%
Next 21 years ½%
Any period beyond ¼%

4.—When Commissions are Due:

All commissions are due and payable in cash upon consummation of the lease.

5.—Percentage Leases:

With minimum guarantee the commission shall be 5% for the first year and 2½% of the minimum rental for the next 20 years of the lease, payable at time lease is signed. In event lessee pays additional rentals over and above minimum guaranteed rental, the broker shall at the time of payment of such rentals be entitled to additional commissions of 5% of amount collected.

6.—Without minimum guarantee the commission shall be 5% of the total rentals for the full term of the lease, payable at the time of payment of such rentals.

7.—Net Leases:

When consummating net leases, taxes on leased premises to be paid by lessee shall be treated as part of the rent on which brokers commission is based, using the taxes for current year when ascertainable, otherwise those for the previous year, as a basis. In event of improvements on leased premises where improvements have not been assessed, the taxes shall be estimated.

8.—Option to Renew Lease:

In any lease For More Than One Year, giving the lessee an option or privilege to renew or extend said lease and where lessee exercises the option or privilege, and/or where lessee remains in the premises beyond the time specified in the original lease, the lessor is to pay the agent a commission of 2½% on whatever rental or terms then agreed upon between the lessor and lessee for the extended period.

For Any Lease for One Year Periods With Option to Renew Annually, the Commission Shall be at the Rate 5% on Each Extension or Renewal.

The Above Commissions to be paid in cash at the time of renewal or extension.

9.—Sale of Lease, or Business:
The commission for the sale of a lease and/or assets of a business, including merchandise, fixtures and quipment, shall be 10% on the first $50,000. and 5% on the excess over $50,000.

10.—Option of Purchase:
Should the lessee exercise an option of purchase contained in the lease and actually purchases the property, whether or not the purchase is made on exactly the terms specified in the lease, the owner shall pay the broker who negotiated the lease the usual commission applicable to the sale of said property, less the lease commission for the unexpired term, and all options of purchase shall contain such agreement.

11.—Cancellation of Leases:
If an Agent Procures a Cancellation of a Lease, the Regular Rental Commission Shall be Charged and Applied to What Would Have Been the Total of the Lease Had it Run to its Conclusion, the Commission to be Paid by the Party Whom the Agent Represents, or According to Advance Agreement.

Section 4

Leases-Residential Property

For negotiating and making leases where rents are not collected by the broker and property is not under his management and there is no managing agent, charges shall be made as follows:

1.—Monthly tenancy or lease for one year: One-half of first month's rent.

2.—Lease exceeding one year: 5% for first year and thereafter 2½% of gross rent for term of lease which shall be not less than one-half of one month's rent.

3.—Commissions set out above are payable in cash at time of securing tenant or consummation of lease.

4.—Option to Renew Lease: See Section 3—#8

5.—Option of Purchase: See Section 3—#10

1588

Section 5

Property Management

Where agent collects rent and/or manages property the following charges shall be made:

1.—The commission for collection of rents and management of property shall be 5% of the gross rent, payable as collected, for all classes of property up to $100,000. annually.

2.—On an individual building OR PROJECT where the gross annual rental exceeds $100,000. commission on the excess shall be subject to agreement.

3.—Minimum commission on all rentals under $20. per month shall be $1.00.

4.—When collection of rents or management of property, excepting apartment houses, is withdrawn from broker, he shall be paid in cash IN ADDITION TO THE COMMISSION HE HAS ALREADY COLLECTED, AS FOLLOWS:

(a) In cases of monthly tenancies or where term is for one year or less, broker shall be paid A SUM WHICH WHEN ADDED TO COMMISSIONS ALREADY COLLECTED, shall equal one-half month's rent.

(b) For leases exceeding one year broker shall be paid in cash a commission of 2½% of the gross rent for balance of the lease.

5.—If at any time during the first year, the collection of rents or management of an apartment house is withdrawn from the broker he shall be paid in cash 2½% of the gross rent for the remainder of the unexpired period of one year from the date of tenancy on all apartments rented by him.

6.—Owners of office buildings, apartment buildings or cooperative apartments shall pay the salary of building or resident managers, surety bond for such managers, and for all advertising and booklets.

7.—The minimum fee for managing a cooperative apartment building shall be 5% of the gross annual rental as agreed upon between the owners and the agent without limitation as to the amount of gross annual rental, with an additional commission charged the individual owners for the collection of rent and management of individually rented apartment units at the rate of 5% of the gross rental of such units.

8.—The cost of making and checking inventories in furnished properties shall be paid by the owner.

9.—AN AGENT SHALL HANDLE EACH LEASE OR SUBLEASE AS A NEW TRANSACTION AND SHALL CHARGE THE ESTABLISHED RENTAL COMMISSION ON TOTAL GROSS RENT.

SECTION 6

MORTGAGE LOANS

Minimum Commissions

1.—The commission on all first trust loans within the District of Columbia and Montgomery County, Maryland,

of $100,000, or less (except construction loans), shall be 1½% for a three-year term; 2% for a five-year term and 2½% for any term over five years. When the amount of the loan is over $100,000. the commission rate to apply on the excess over $100,000. shall be ½% less than the above schedule.

2.—The commission on all construction loans within the District of Columbia and Montgomery County, Maryland, shall be 2% for a three-year term and 2½% for a five year term..

3.—For all first trust loans secured on property located beyond the limits of the District of Columbia (with the exception of Montgomery County, Maryland) increase the above schedule ½% throughout.

4.—The minimum commission on first trust loans of less than $1,700. shall be $25.00.

5.—The commission for renewals of loans shall be ½% less than the schedules outlined in paragraphs 1 and 3 with a minimum commission of $17. for renewals of loans for less than $1,700.

1589 6.—Commissions may be waived in cases of religious and philanthropic institutions in respect to both original loans or renewals thereof.

7.—Lending agencies (operating as such and not as real estate brokers) shall not be required to comply with the minimum schedules set forth herein.

Section 7

Special Services.

1.—Advisory Services and Analyses:
Charge for advisory service such as analyses and studies of property shall be by special arrangement and shall be commensurate with the importance of the subject matter and the time required.

2.—Building Restriction Adjustments:
If a Realtor is required to gather facts and to appear before Planning and Zoning Commissions, or other such tribunals, a fee commensurate with the service rendered shall be charged.

3.—Tax Adjustments or Reductions:
For assembling and preparing data on tax adjustments or reductions and for appearing before the necessary taxing authority, courts, or other tribunal, the Relator's charge shall be 50% of the first year's savings.

CHANGES PROPOSED IN DIVISION OF COMMISSIONS

RULE 1—THE SELLING OFFICE SHALL BE ENTITLED TO SIXTY PER CENT OF THE TOTAL COMMISSION ON ALL SALES OF REAL ESTATE WHERE THE TOTAL SALE PRICE IS NOT IN EXCESS OF $30,000.

(Rule 1 now reads: The selling office shall be entitled to two thirds of the total commission on all sales of real estate where the total sale price is not in excess of $30,000.; provided the selling office receives the listing direct from the listing office and not through a salesman in listing office. However, where a salesman is involved in the listing office, the commission should be equally divided.)

No changes are proposed for Rule 2 and 3, which read as follows:

Rule 2. On all other sales the commission should be equally divided.

Rule 3. Brokers not members of the Washington Real Estate Board are only entitled to an equal division of commissions.

.....

It is recommended that Rule 8 be changed to make it conform to Rule 14 making it read as follows:

Rule 8. Where one broker collects the rent or manages the property the broker securing the tenant shall not participate in the commission on the renewal of any lease whether or not the original lease contains an option for such renewal. UNLESS UPON SPECIAL AGREEMENT.

1590 *Government's Exhibit 24.*

WASHINGTON REAL ESTATE BOARD
1417 K Street, N. W.

December 20, 1944

SPECIAL NOTICE TO ACTIVE MEMBERS:

At a special meeting of Active members of the Washington Real Estate Board, held Tuesday, December 19, 1944, notice of which has been mailed all members, action was duly taken to modify several sections of the present schedule of Commissions and the Rules for the Division of Commissions.

As soon as copies of the revised schedules can be printed, copies will be sent to members. Pending that time, you are hereby advised that the following changes have been made. Kindly refer to the mimeographed copy of the proposed changes which were previously sent your office.

No further changes were made in *Section 1*.

No further changes were made in *Section 2*.

The only changes in *Section 3* were brought about by the consolidation of Par. 5 with Par. 6, which makes it necessary to renumber the other paragraphs as follows:

Par 6—Net Leases
Par 7—Option to Renew Lease
Par 8—Sales of Lease or Business
Par 9—Option to Purchase

and on new Par. 10: Cancellation of Leases, which reads: If an agent procures a modification or cancellation of a lease, the regular rental commission shall be charged for what would have been the total of the remaining rental under the lease had it run to its conclusion, the commission to be paid by the party whom the agent represents, or according to advance agreement.

Changes in *Section 4* are:

Par. 2—Lease exceeding one year: 5% for first year and thereafter 2½% of gross rent for balance of term of lease.

Par. 3—Commissions set out above are payable in cash at time of consummation of lease or rental agreement.

Par. 4—same as Par. 7, Section 3—Option to Renew Lease.

Par 5—same as Par. 9, Section 3—Option of Purchase.

The only change in *Section 5*, was made in Par. 1, which now reads: The commission for collection of rents and management of property shall be 5% of the gross rent, payable as collected, for all classes of property up to $100,000. annually. In any lease where agent collects rent and or manages property, and where said lease gives lessee an option or privilege to renew or extend said lease and where lessee exercises the option or privilege, and or where lessee remains in said premises beyond time specified in the lease, the lessor shall pay the agent a commission of 5% for the renewal or extended term or terms. Lessor, however, may have the option to pay the agent a cash commission at any time according to the provisions of paragraphs 4 or 5 of this section.

1591 The sub-heading—Minimum Commissions in *Section 6* was stricken out. Par. 6—now reads: Commissions may be waived in respect to both original loans

or renewals thereof in cases of religious or philanthropic institutions, or where a service charge or other compensation is to be collected by the broker.

Par. 3 in *Section 7* was revised to read: TAX ADJUSTMENTS OR REDUCTIONS: For assembling and preparing data on tax adjustments or reductions and for appearing before the necessary taxing authority as an advocate, the Realtor's charge shall be 50% of the first year's savings.

The Rules for Division of Commissions were changed as follows:

RULE 1—The selling office shall be entitled to 60% of the total commission on all sales of real estate where the total sale price is not in excess of $50,000.

RULE 2—On all other sales the commission shall be equally divided except that where the sales price is more than $50,000. the commission on the first $50,000. thereof shall be divided 60% to the selling office and 40% to the listing office and the commission on the balance of the sales price above $50,000. shall be divided equally.

No change was made in RULE 3, which reads: Brokers not members of the Washington Real Estate Board are only entitled to an equal division of commissions.

RULE 8—Where one broker collects the rent or manages the property the broker securing the tenant shall not participate in the commission on the renewal of any lease whether or not the original lease contains an option for such renewal, unless upon special agreement.

RULE 9—There shall be no division of commission between brokers on any lease where the monthly rental is less than $100. unless upon special agreement.

RULE 12—There shall be no division of commissions to other than licensed real estate brokers.

RULE 17—All agreements between owner and broker as to commission should be incorporated in the lease or in a property management agreement. Agreements between brokers as to the division of a commission should be reduced to writing and signed.

Please remember that these changes apply to the mimeographed copy of the Commission Schedule sent to your office December 5, and the entire Schedule becomes effective as of December 19, 1944.

Respectfully yours,

CHAS. J. RUSH
Executive Secretary

CJR:hs

1592 *Government's Exhibit 25*

Washington Real Estate Board
"An Association of Realtors"
(Inc. July 19, 1928)
1417 K Street, N. W. Washington 5, D. C.
PHONE—NAtional 4494

SCHEDULE OF
COMMISSIONS
Revised to
December 19, 1944

1593 Washington Real Estate Board

COMMISSIONS AND CHARGES

Schedule of Commissions and Fees Adopted by the Washington Real Estate Board as Standard for its Members

SECTION 1

SALES

1. The standard commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000 and 3% on the excess above $50,000.

2. In the adjacent Metropolitan area in Maryland, under the jurisdiction of the Board, the rate shall be 5% of the total sales price.

3. Where the property is located in an area which is more than 20 miles from the zero milestone, the rate may be increased to not more than 10%, if such rate is agreed upon at the time property is listed.

4. The minimum Commission on sales of property shall be $100. When property is unimproved and the sales price is less than $1,000, the amount of the commission charged shall be by agreement, not to exceed $100. All commissions shall be based on total value or sales prices of properties and not on equities or partial payments.

5. For purchasing real estate the commission shall be the same as for selling.

6. When property is priced at a salable figure the Realtor may advertise such listed properties at his own expense, however, the mere listing or placing of properties with a Realtor does not impose an obligation upon him to advertise at his own expense.

7. The Act of Congress creating the District of Columbia Real Estate Commission requires all brokers and
1594 salesmen to obtain the written consent of the owner or his authorized agent before they may offer the property for sale or for rent.

8. Written consent is also required before a sign may be placed on any property within the District of Columbia.

Section 2

Exchanges

1. In the exchange of real estate within the District of Columbia, a commission shall be charged each owner, at the rate of 2½% of the exchange price of lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 5% up to and including $50,000 and 3% for the amount above $50,000 if located within the District of Columbia.

2. When the property is located in the Metropolitan area in Maryland, the owner of the higher valued property shall be charged a commission of 5% on the excess, each party to the exchange paying 2½% on the lower valued property.

3. Where a property is located beyond the 20-mile area, the commission shall be subject to agreement.

4. The minimum commission for any exchange shall be $100 from each side.

Section 3

Leases—Business Property

For negotiating and making leases where rents are not collected by the broker and property is not under his management, and there is no managing agent, charges shall be made as follows:

1. Monthly tenancy: One-half of first month's rent.

2. Leases: One year: 5%.

3. *Leases—Term:*

First year	5%
Next 20 years	2½%
Next 21 years	1%
Next 21 years	½%
Any period beyond	¼%

1595 4. When commissions are due: All commissions are due and payable in cash upon consummation of the lease.

5. *Percentage leases:* With minimum guarantee the commission shall be 5% for the first year and 2½% of the

minimum rental for the next 20 years of the lease, payable at time lease is signed. In event lessee pays additional rentals over and above minimum guaranteed rental, the broker shall at the time of payment of such rentals be entitled to additional commissions of 5% of amount collected.

Without minimum guarantee the commission shall be 5% of the total rentals for the full term of the lease, payable at the time of payment of such rentals.

6. *Net Leases:* When consummating net leases, taxes on leased premises to be paid by lessee shall be treated as part of the rent on which brokers commission is based, using the taxes for current year when ascertainable, otherwise those for the previous year, as a basis. In event of improvements on leased premises where improvements have not been assessed, the taxes shall be estimated.

7. *Option to renew lease:* In any lease for more than one year, giving the lessee an option or privilege to renew or extend said lease and where lessee exercises the option or privilege, and/or where lessee remains in the premises beyond the time specified in the original lease the lessor is to pay the agent a commission of 2½% on whatever rental or terms then agreed upon between the lessor and lessee for the extended period.

For any lease for one year periods with option to renew annually, the commission shall be at the rate of 5% on each extension or renewal.

The above commissions to be paid in cash at the time of renewal or extension.

8. *Sale of lease or business:* The commission for the sale of a lease and/or assets of a business, including merchandise, fixtures and equipment, shall be 10% on the first $50,000 and 5% on the excess over $50,000.

9. *Option of Purchase:* Should the lessee exercise an option of purchase contained in the lease and actually purchases the property, whether or not the purchase is made on exactly the terms specified in the lease, the owner shall pay the broker who negotiated the lease the usual commission applicable to the sale of said property, less the lease commission for the unexpired term, and all options of purchase shall contain such agreement.

1596

10. *Cancellation of Leases:* If an agent procures a modification or cancellation of a lease, the regular rental commission shall be charged for what would have been the total of the remaining rental under the lease had it run to its conclusion, the commission to be paid by the party whom the agent represents, or according to advance agreement.

Section 4

Leases—Residential Property

For negotiating and making leases where rents are not collected by the broker and property is not under his management and there is no managing agent, charges shall be made as follows:

1. Monthly tenancy or lease for one year; One-half of first month's rent.

2. Lease exceeding one year: 5% for first year and thereafter 2½% of gross rent for balance of term of lease.

3. Commissions set out above are payable in cash at time of consummation of lease or rental agreement.

4. *Option to Renew Lease:* In any lease for more than one year, giving the lessee an option or privilege to renew or extend said lease and where lessee exercises the option or privilege, and/or where lessee remains in the premises beyond the time specified in the original lease, the lessor is to pay the agent a commission of 2½% on whatever rental or terms then agreed upon between the lessor and lessee for the extended period.

For any lease for one year periods with option to renew annually, the commission shall be at the rate of 5% on each extension or renewal.

The above commissions to be paid in cash at the time of renewal or extension.

5. *Option of Purchase:* Should the lessee exercise an option of purchase contained in the lease and actually purchases the property, whether or not the purchase is made on exactly the terms specified in the lease, the owner shall pay the broker who negotiated the lease the usual commission applicable to the sale of said property, less the lease commission for the unexpired term, and all options of purchase shall contain such agreement.

1597

Section 5

Property Management

1. The commission for collection of rents and management of property shall be 5% of the gross rent, payable as collected, for all classes of property up to $100,000.00 annually. This provision shall apply not only to the original lease but to any extensions or renewals thereof, or where the lessee remains in possession beyond the term of the original lease.

2. On an individual building or project where the gross annual rental exceeds $100,000.00 commission on the excess shall be subject to agreement.

3. Minimum commission on all rentals under $20 per month shall be $1.00.

4. When collection of rents or management of property, excepting apartment houses, is withdrawn from broker, he shall be paid in cash in addition to the commission he has already collected, as follows:

(a) In cases of monthly tenancies or where term is for one year or less, broker shall be paid a sum which when added to commissions already collected, shall equal one-half month's rent.

(b) For leases exceeding one year broker shall be paid in cash a commission of 2½% of the gross rent for balance of the lease.

5. If at any time during the first year, the collection of rents or management of an apartment house is withdrawn from the broker he shall be paid in cash 2½% of the gross rent for the remainder of the unexpired period of one year from the date of tenancy on all apartments rented by him.

6. Owners of office buildings, apartment buildings or co-operative apartments shall pay the salary of building or resident managers, surety bond for such managers, and for all advertising and booklets.

7. The minimum fee for managing a cooperative
1598 apartment building shall be 5% of the gross annual rental as agreed upon between the owners and the agent without limitation as to the amount of gross annual rental, with an additional commission charged the individual owners for the collection of rent and management of individually rented apartment units at the rate of 5% of the gross rental of such units.

8. The cost of making and checking inventories in furnished properties shall be paid by the owner.

9. An agent shall handle each lease or sublease as a new transaction and shall charge the established rental commission on total gross rent.

Section 6

Mortgage Loans

1. The commission on all first trust loans within the District of Columbia and Montgomery County, Maryland, of $100,000 or less (except construction loans), shall be 1½% for a three-year term; 2% for a five-year term and 2½% for any term over five years. When the amount of the loan is over $100,000 the commission rate to apply on the excess over $100,000 shall be ½% less than the above schedule.

2. The commission on all construction loans within the District of Columbia and Montgomery County, Maryland,

shall be 2% for a three-year term and 2½% for a five year term.

3. For all first trust loans secured on property located beyond the limits of the District of Columbia (with the exception of Montgomery County, Maryland) increase the above schedule ½% throughout.

4. The minimum commission on first trust loans of less than $1,700 shall be $25.00.

5. The commission for renewals of loans shall be ½% less than the schedules outlined in paragraphs 1 and 3 with a minimum commission of $17.00 for renewals of loans for less than $1,700.

6. Commissions may be waived in respect to both original loans or renewals thereof in cases of religious or philanthropic institutions, or where a service charge or other compensation is to be collected by the broker.

7. Lending agencies (operating as such and 4599 not as real estate brokers) shall not be required to comply with the schedules set forth herein.

Section 7

Special Services

1. *Advisory Services and Analyses:*

Charges for advisory service such as analyses and studies of property shall be by special arrangement and shall be commensurate with the importance of the subject matter and the time required.

2. *Building Restriction Adjustments:*

If a Realtor is required to gather facts and to appear before Planning and Zoning Commissions, or other such tribunals, a fee commensurate with the service rendered shall be charged.

3. *Tax Adjustments or Reductions:*

For assembling and preparing data on tax adjustments or reductions and for appearing before the necessary taxing authority as agent for the property owner, the Realtor's charge shall be 50% of the first year's savings.

* * *

* Not every real estate agent is a Realtor. In Washington and the Metropolitan Section of Maryland a Realtor is a member of the Washington Real Estate Board who is affiliated with the National Association of Real Estate Boards and agrees to abide by its Code of Ethics.

* When you consider making any real estate transaction—buying-selling-leasing-renting or financing—

You will find it pays to consult a
REALTOR
a member of the
WASHINGTON REAL ESTATE BOARD

1600 *Government's Exhibit 26*

Washington, D. C. ....., 194...

SALES CONTRACT

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RECEIVED FROM .....
a deposit of ..... Dollars ($.....)
(Cash)
(Check) to be applied as part payment of the purchase of
.....
Lot .....
..... in Square .....
with improvements thereon known as .....
.....
in the District of Columbia .....
upon the following terms of sale:

(1) Price ..... Dollars ($.....).

(2) Purchaser agrees to pay ..... Dollars ($.....) cash at the date of conveyance, of which sum this deposit shall be a part.

(3) The purchaser is to .....
a first deed of trust secured on the premises of .....
..... Dollars ($.....)
due ..... 19..., bearing interest at the rate of ..... per cent per annum, payable .....
.....
.....

(4) For the balance of deferred purchase money amounting to ..... Dollars ($.....) purchaser is to execute and deliver a second deed of trust secured on said premises, to be paid in monthly installments of ..... Dollars ($.....), or more, including interest at the rate of per cent per annum, each installment when so paid to be applied, first to the payment of interest on the amount of principal remaining unpaid and the balance thereof credited to principal .....
.....
.....
.....

Trustees in all deeds of trust are to be named by the parties secured thereby.

(5) The property is sold free of encumbrance, except as aforesaid, title is to be good of record, subject, however, to covenants, conditions and restrictions of record, as set forth on the reverse side hereof or attached hereto and made a part thereof; otherwise, the deposit is to be returned and sale declared off at the option of the purchaser, unless the defects are of such character that they may readily be remedied by legal action, but the seller and Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken promptly by and at the seller's expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such action.

(6) Seller agrees to execute and deliver a good and sufficient special warranty deed, and to pay for Federal revenue stamps on the deed.

(7) Property is sold and shall be conveyed subject to an existing tenancy as follows: .....

.....

Seller agrees to give possession at time of settlement. If seller shall fail so to do and occupies said property, seller shall become and be thereafter a tenant at sufferance of the purchaser, and hereby expressly waives all notice to quit provided by law.

(8) Seller assumes the risk of loss or damage to said property by fire or other casualty until the executed deed of conveyance is delivered to the purchaser or is recorded for him by the Title Company making the settlement.

(9) All notices of violations of Municipal orders or requirements noted or issued by any Department of the District of Columbia, or actions in any court on account thereof, against or affecting the property at the date of settlement of this contract, shall be complied with by the seller, and the property conveyed free thereof.

(10) Settlement is to be made at the office of the Agent or at the Title Company searching the title, and deposit with the Agent or at the Title Company of the cash payment as aforesaid, the deed of conveyance and such other papers as are required by the terms of this contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof.

(11) Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes as issued by the Collector of Taxes of the District of Columbia, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by the seller or allowance made therefor at the time of transfer.

(12) Examination of title, tax certificate, conveyancing, notary fees, State revenue stamps, if any, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser who hereby authorizes the undersigned Agent to order the examination of title provided, however, that if upon examination the title should be found defective, and is not remedied as aforesaid, the seller hereby agrees to pay the cost of the examination of the title and also to pay the Agent herein the commission hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied with.

(13) Within.....days from the date of acceptance hereof by the seller, or as soon thereafter as a report on the title can be secured if promptly ordered, and/or survey, if required, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof.

If the purchaser shall fail to make full settlement, the deposit herein provided for may be forfeited at the option of the seller, in which event the purchaser shall be relieved from further liability hereunder, or, without forfeiting the deposit, the seller may avail himself of any legal or equitable rights and remedies which he may have under this contract.

(14) The entire deposit shall be held by ..... Agent, until settlement hereunder is made or until the deposit is forfeited. In the event of the forfeiture of the deposit, the Agent shall retain one-half thereof as a compensation for his services and shall pay to the seller the remaining one-half of the forfeited deposit.

(15) If the property involved in this contract is located in a jurisdiction other than the District of Columbia, wherever any reference is made to the District of Columbia or any official thereof, the name of the jurisdiction in which the property is located and the proper official thereof is substituted automatically. If the property is serviced by the Washington Suburban Sanitary Commission, annual benefit charges of said Commission are to be adjusted to date of transfer and assumed thereafter by purchaser.

(16) The seller agrees to pay to.....

.....

Agent, the regular rate of commission fixed by the Washington Real Estate Board, the amount of which said commission being hereby assigned to the Agent by the seller out of the proceeds of sale. The party through whom settlement hereunder is made is hereby authorized and directed to make deduction of the aforesaid commission from the proceeds of the sale and to make payment thereof to said Agent.

(17) The principals to this contract mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns; that the provisions hereof shall survive

execution and delivery of the deed aforesaid and shall not be merged therein; that this contract contains the final and entire agreement between the parties hereto, and that they shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not herein contained. Executed in .....

.....

.....

.....

Agent

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

.....

Purchaser

.....

Purchaser

....., 19....

.....

Seller

....., 19....

.....

Wife of Seller

Property is to be conveyed in the name of .....

1601 *Government's Exhibit 27*

Memorandum of meeting of Commission Study Committee held in the offices of the Board on Wednesday, May 10th, 1939 at 10:30 A. M.

Present: Messrs. Smith, Murray, Taylor, Dodge, Herbert, Koones and Bangs.

Absent: Mr. Phillips.

Mr. Smith called the meeting to order and called upon Mr. Bangs who made an informal report on the action of the National Association's Committee on Rates, Rules and Customs. He stated he had recommended that the report of the Committee be submitted to all Real Estate Boards as a guide in their own work. It was Mr. Bangs' opinion that the recommendations of the Committee of the National Association would be in shape for consideration during the National Convention in Los Angeles in October.

It was the general sense of this Committee that should any change be made in the Washington Board's schedules that the study being made by the National Committee would be highly essential and beneficial to the local Board.

It was brought out during the discussion that the resolutions of the National Committee would only be in the shape of a guide and not an attempt to force the adoption of a nation-wide commission schedule.

Motion offered by Mr. Taylor, seconded by Mr. Koones, recommended that no action be taken by this Committee in connection with the study of existing commission schedules until such time as the Washington Real Estate Board is in receipt of the recommendations of the Committee on Rates, Rules and Customs, after their approval by the National Association of Real Estate Boards. This motion was unanimously adopted.

Adjournment.

1602 *Government's Exhibit 28*

Washington Real Estate Board
"An Association of Realtors"
(Inc. July 19, 1928)
1417 K Street, N. W., Washington 5, D. C.
Phone—NAtional 4494

SCHEDULE OF COMMISSIONS

Revised to
February 16, 1943

1603 Washington Real Estate Board

★

SCHEDULE OF COMMISSIONS

Schedule of Commissions and Fees Adopted by the Washington Real Estate Board as Standard for its Members

SALES

1. The minimum commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000, and 3% on the excess above $50,000, and in the adjacent Metropolitan area in Maryland shall be at a minimum of 5%. Revised Feb. 16, 1943.

2. The minimum commission for any sale shall be $100.00. Revised Feb. 16, 1943.

EXCHANGES

3. In the exchange of real estate a commission shall be charged each owner at the rate of 2½% of the exchange price of the lower valued property, with an additional charge against the owner of the higher valued property for the excess at the rate of 5% up to and including $50,000, and 3% for the amount above $50,000, if located within the Dis-

trict of Columbia. Where the property is located in the Metropolitan area in Maryland, the owner of the higher valued property shall be charged a commission of 5% on the excess, each party to the exchange paying 2½% on lower valued property. Revised Feb. 16, 1943.

4. The minimum commission for any exchange $100.00 each side.

Leasing

Business Property

5. For negotiating and making leases where rents are not collected by the broker and property is not under
1604 his management, and there is no managing agent, charges shall be made as follows:

6. Monthly tenancy: One-half of first month's rent.

7. Leases: One year, 5%.

8. Leases: First year 5% and thereafter up to 21 years 2½% of gross rental for term of lease.

9. Long Term Leases:

2½% of gross rental for first 21 years
1% for next 21 years
½% for next 21 years
¼% for any period beyond.

10. When Commissions are Due:

All commissions are due and payable in cash upon consummation of the lease.

11. Percentage Leases:

With minimum guarantee the commission shall be 5% for the first year and 2½% of the minimum rental for the next 20 years of the lease, payable at time lease is signed. In event lessee pays additional rentals over and above minimum guaranteed rental, the broker shall at the time of payment of such rentals be entitled to additional commissions of 5% of amount collected.

12. Without minimum guarantee the commission shall be 5% of the total rentals for the full term of the lease, payable at the time of payment of such rentals.

13. Net Leases:

When consummating net leases, taxes on leased premises to be paid by lessee shall be treated as part of the rent on which brokers commission is based, using the taxes for current year when ascertainable, otherwise those for the previous year, as a basis. In event of improvements on leased premises where improvements have not been assessed, the taxes shall be estimated.

14. Option to Renew Lease:

In any lease giving the lessee an option or privilege to renew or extend said lease and where lessee exercises the option or privilege, and/or where lessee remains in the premises beyond the time specified in the original lease, the lessor is to pay the agent a commission on the ex-
tended period on whatever rental or terms then
1605 agreed upon between the lessor and lessee at the
regular commission rate based on the date of the original lease. The commission is to be paid in cash at the time of renewal or extension.

15. Sale of Lease or Business:

The Commission for the sale of a lease and/or assets of a business, including merchandise, fixtures and equipment, shall be 10% on the first $50,000.00 and 5% on the excess over $50,000.00.

16. Option of Purchase:

Should the lessee exercise an option of purchase contained in the lease, and actually purchase the property, whether or not the purchase is made on exactly the terms specified in the lease, the owner shall pay the broker who negotiated the lease the usual commission applicable to the sale of said property, less the lease commission for the unexpired term, and all options of purchase shall contain such agreement.

Residential Property

17. For negotiating and making leases where rents are not collected by the broker and property is not under his management, and there is no managing agent, charges shall be made as follows:

18. Monthly tenancy or lease for one year: One-half of first month's rent.

19. Lease exceeding one year: 5% for first year and thereafter 2½% of gross rent for term of lease which shall be not less than one-half of one month's rent.

20. Commissions set out above are payable in cash at time of securing tenant or consummation of lease.

21. Option to Renew Lease: Same as No. 14 above.

22. Option of Purchase: Same as No. 16 above.

Property Management

Where agent collects rent and/or manages property the following charges shall be made:

23. The commission for collection of rents and management of property shall be 5% of the gross rent, payable

as collected, for all classes of property up to
1606 $100,000.00, and on an individual building where the gross annual rental exceeds $100,000.00 commission on the excess shall be subject to agreement.

24. Minimum commission on all rentals under $20.00 per month shall be $1.00.

25. When collection of rents or management of property, excepting apartment houses, is withdrawn from broker he shall be paid in cash:

(a) In cases of monthly tenancies or where term is for one year or less broker shall be paid one-half month's rent;

(b) For leases exceeding one year broker shall be paid in cash a commission of 2½% of the gross rent for balance of the lease.

26. If at any time during the first year, the collection of rents or management of an apartment house is withdrawn from the broker he shall be paid in cash 2½% of the gross rent for the remainder of the unexpired period of one year from the date of tenancy on all apartments rented by him.

27. Owners of office buildings, apartment buildings or co-operative apartments shall pay the salary of building or resident managers, surety bond for such managers, and for all advertising and booklets.

28. The minimum fee for managing a cooperative apartment building shall be 5% of the gross annual rental as agreed upon between the owners and the agent without limitation as to the amount of gross annual rental, with an additional commission charged the individual owners for the collection of rent and management of individually rented apartment units at the rate of 5% of the gross rental of such units.

29. The cost of making and checking inventories in furnished properties shall be paid by the owner.

Mortgage Loans

Minimum Commissions

30. The Commission on all first trust loans within the District of Columbia and Montgomery County, Maryland, of $100,000.00 or less (except construction loans), shall be
1½% for a three-year term; 2% for a five-year term
1607 and 2½% for any term over five years. When the amount of the loan is over $100,000.00 the commission rate to apply on the excess over $100,000.00 shall be ½% less than the above schedule.

31. The commission on all construction loans within the District of Columbia and Montgomery County, Maryland, shall be 2% for a three-year term and 2½% for a five-year term.

32. For all first trust loans secured on property located beyond the limits of the District of Columbia (with the exception of Montgomery County, Maryland) increase the above schedule ½% throughout.

33. The minimum commission on first trust loans of less than $1,700.00 shall be $25.00.

34. The commission for renewals of loans shall be ½% less than the schedules outlined in paragraphs 30 and 32 with a minimum commission of $17.00 for renewals of loans for less than $1,700.00.

35. Commissions may be waived in cases of religious and philanthropic institutions in respect to both original loans or renewals thereof.

36. Lending agencies (operating as such and not as real estate brokers) shall not be required to comply with the minimum schedules set forth herein.

• • •

- Not every real estate agent is a Realtor. In Washington and the Metropolitan Section of Maryland a Realtor is a member of the Washington Real Estate Board who is affiliated with the National Association of Real Estate Boards and agrees to abide by its Code of Ethics.
- When you consider making any real estate transaction—buying-selling-leasing-renting.

You will find that it pays to consult a
REALTOR
a member of the
Washington Real Estate Board

1608 *Government's Exhibit 29*

February 28, 1935

Mr. Joseph Laronge
Union Trust Bldg.,
Cleveland, Ohio

Dear Joe:

We have a compilation of the commission rates which is very bulky and voluminous, covering most of the cities in the country. I think perhaps for your purpose a part of this complete study which was published in the Real Estate Journal, covering all of the cities of one thousand popula-

tion and over, might be better. This appeared in the Roster Issue for April, 1932, page fifty-three. We plan a similar issue in the next two or three months so as to incorporate any changes. Changes, however, are relatively few.

Personally I have long favored adoption by all of our Boards of a uniform statement or basis on commissions, with however provisions for various percentages according to the needs and customs of each community. This whole question of commissions is at present such a chaotic jumble that it is almost impossible for those doing business in various cities to get a clear picture. We have had complaints from the chain stores and insurance companies repeatedly. Some of the schedules are unintelligible because of bad wording. In some cities, a commission on a ground lease is based on the value of the property and in other places based on the total rent. In some cities a management fee includes the making of leases and repairs and in others it doesn't. And so on. Then, there is, of course, the adequacy of the rates. In Birmingham for instance they charge a rate for management of three percent which covers everything under the sun. In other cities the rate is five percent on management, five percent on new leases and five percent on repairs. Even this is low. Officials of the Prudential Company stated they believed an over all fee of about seven percent is necessary if the management office is to make any money and do a nice job.

1609 We recognize that there has to be a variation in rates. Small towns, because of low values, usually have higher rates all down the line. Western cities are usually higher than Eastern cities. I believe, however, that all of these factors can be taken care of by the drafting of a schedule upon which all could agree, permitting each community to insert its own percentage rates. I believe that this might bring us in more close touch with each other, and bring about a general increase throughout the country wherever justified.

I did not mean to unload all of these comments on you in response to your brief note. It happens to be a suggestion which I have had on my mind for some years and I do wish we could do something about it. Perhaps the moment has come when we can. If you see any hope along the lines of which I speak, I would be very glad indeed to suggest to our President that a National Committee be immediately appointed to go to work on this. Of course, I would very much like to see you on such a committee if it were appointed. There are few tasks which you accomplish such practical results for our fraternity as this if it can be done.

I believe one of the best things the American Institute of Architects ever did was to develop a uniform contract of employment setting forth what an architect is supposed to do, describing his responsibilities briefly and establishing the basis of his charges. While the architect is free to vary the percentages and charges in a given case, he uses the same standard uniform contract. The fact that there is a standard contract used throughout the country and the basis of fee established eliminates an endless amount of difficulties and troubles which I am told they were subjected to years ago. It seems to me this case is very much in point with respect to our own problems.

Hope you are fully recovered from your recent illness.

Sincerely,

.....
Secretary

HUN:LLM

1610 *Government's Exhibit 30*

National Association of Real Estate Boards
22 West Monroe Street Chicago, Illinois

September 4, 1935

Mr. Morton J. Luchs
1505 H Street, N. W.
Washington, D. C.

Dear Mr. Luchs:

Under the chairmanship of Robert R. Otis, of Atlanta, President Schmidt of our Association is appointing a Committee on Rates, Rules and Customs, which will be representative of our real estate boards, throughout the country. The purpose of this Committee is to study the schedules now in existence and to see if there could be developed something in the way of a national schedule with proper provisions for regional and local variations and for variations due to size of cities.

Insurance companies and other institutional investors having property in various cities complain constantly, and with justice, about the confusion and the seemingly illogical variations that now exist. If we can clarify this situation it may well be that we can improve the income of our membership and gain wider acceptance for the fair charges established.

I have heard from your Board of your experience in this matter in Washington and you have been recommended for

appointment on this Committee. I hope that you will be willing to serve. Upon receipt of your acceptance of this appointment, we will keep you in touch with any developments of the Committee and the accountants who are working with Mr. Otis in this matter.

Sincerely,

H. M.
Secretary

HUN:GWW

CC to Washington Real Estate Board

Copy

1611 *Government's Exhibit 31*

Report on Association's Activities
By the Secretary
January, 1936

MEMBERSHIP

In January, 1935-419 Boards, 10,600 members; in January, 1936-430 Boards, 11,500 members (estimated).

Certified membership lists now coming in. Uniformly show increase from 10% to 20%, and in a few cases 100%.

Five Boards—Boston, Detroit, Indianapolis, Grand Rapids, and Flint—now have new form of membership for property owners, giving owners voice in matters affecting their interests only.

We have prepared a pamphlet on the term "Realtor" and a series of follow-up letters for new members to aid Boards in membership work. If business continues to improve at the current rate, it should be possible to add from two to three thousand names to our rolls in 1936.

FINANCES

In spite of new and unforseen activities, the Association has during 1935 lived substantially within its income. Receipts in the General Fund, including receipts from conventions, have amounted to $109,678.20: expenditures have been $109,934.72, showing an excess of disbursements over receipts of only $256.52. This leaves our small surplus almost intact.

During the past year the Divisions have taken in, including educational work, $33,662.74 and expended $29,204.81.

It is suggested that in handling the administrative work of the Divisions, hereafter the Association make a lump charge against the Divisions for all such services, this amount to be prorated on a fair basis in accordance with

time and effort expended in the office, and then paid into the Association's funds by the Divisions; and that all staff members be placed on the Association's general payroll.

COLLECTIONS

Last January 113 Member Boards showed varying degrees of delinquencies in dues payment. At this time 50 Boards owe dues, most of them in small amounts, previous to July 1, 1935. The remainder of our Boards, 380, are paying on substantially a current basis.

Your officers have made settlements with some Boards on their delinquencies based upon their own collections from local members.

In the past, membership dues of Member Boards have been calculated by us on the basis of lists submitted during the first quarter of the year for the roster. In accordance with a resolution of the Directors, we are now asking each Member Board to submit a certified list in January. This will give both ourselves and the Member Board a clearer basis for establishing the dues obligations.

* * * * *

1616— Report on Association's Activities—Page 6

the loss be interested in a few facts. His work has required more than half of his time from his business; trips to Washington and his insight and judgment in handling Federal matters have been of immeasurable value to our business. He has travelled 40,620 miles and addressed 42 meetings, these meetings reaching a majority of our members. Through his monthly messages in the Real Estate Journal and through his quarterly messages to the entire membership, he has reached substantially all of our members. May I say for the staff that we feel that we have had in 1935 a great President who has helped lay the foundation for a fresh advance in real estate.

Under our new plan, Regional Vice Presidents can function effectively and usefully. In 1935 these officers gave devoted service in organizing their districts. Our experience in the three Regional meetings already held under the leadership of Messrs. Wanless, Wagner and Wagg would seem to indicate the soundness and wisdom of the new plan. We have had general enthusiastic acceptance.

Acknowledgment of the services of officers and committees is a function that belongs to the Board of Directors, but

perhaps no one can know better than I of the time and effort that has been put into the Association's activities by Mark Levy, our Treasurer. His work involves daily correspondence and interviews.

Home Shows

We have set up a Home Show Advisory Bureau with John A. Servas as Director, and have assisted five boards in planning and undertaking "Own Your Home Shows." This service is rendered on the basis of 5% of the Gross receipts from the show. The five boards in question are Baltimore, Miami, Houston, Philadelphia, and Buffalo. Others will follow.

Housing Committee

The Housing Committee has worked on the development of a suggestion for neighborhood improvement to be undertaken by property owners themselves. This so-called Neighborhood Plan has had careful study by good attorneys as well as by city planners and others, and is at present being discussed in scores of cities throughout the country as a basis for rehabilitating lighted districts and protecting existing home neighborhoods. This is one of the most basic things upon which the Association has entered.

Committee on Rates, Rules and Customs

In an effort to bring about more uniformity in language, style, and basis of calculation in Realtors' charges, this Committee was formed during the year under the Chairmanship of Robert R. Otis of Atlanta. This is a long-time effort but one which may yield us important results.

Work With Our Member Boards

It is my belief that currently and in the immediate future the Association should give much of its thought and attention to the development of strength and stability in its Member Boards. A local real estate board performs in many ways the same economic functions as the stock exchange performs in the field of securities. A local real estate market cannot

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1618 *Government's Exhibit 32*

ORDER OF BUSINESS

Board of Directors Meeting

National Association of Real Estate Boards

November 17, 1936

Roosevelt Hotel, New Orleans, La.

1619 ORDER OF BUSINESS

Board of Directors Meeting

National Association of Real Estate Boards

November 17, 1936

Roosevelt Hotel, New Orleans, La.

1. Minutes of Directors Meeting held May 27, 1936, in Chicago, Illinois.

To be approved.

2. New Boards:

To be elected—

El Monte Realty Board, Calif.—12 members
Meriden Real Estate Board, Conn.—9 members
South Palm Beach County Realty Board, Fla.—5 members
Egyptian Real Estate Board, Ill.—11 members
Freeport Real Estate Board, Ill.—5 members
Monmouth County Real Estate Board, N. J.—44 members
Shawnee Real Estate Board, Okla.—9 members
Columbia Real Estate Board, S. C.—6 members

3. Boards to be dropped:

Mendocino County Real Estate Board, Calif.—1 member Board disorganized.

Yolo County Real Estate Board, Calif.—3 members Secretary states Board no longer desires National Membership at $10.00 per member.

Davenport Realty Board, Florida—2 members Board given 90-day notice in June. Has made no attempt to be reinstated.

Gainesville Real Estate Board, Florida—5 members Board given 90-day notice in June. Has made no attempt to be reinstated.

Asbury Park Real Estate Board, N. J.—9 members Board disbanded. Members have affiliated with new Monmouth County Real Estate Board.

Red Bank Real Estate Board, N. J.—11 members Board disbanded. Members have affiliated with new Monmouth County Real Estate Board.

Uniontown Real Estate Board, Pa.—4 members. 90-day notice sent in June. Board states National membership is optional.

Lower Rio Grande Valley Real Estate Board, Texas—1 member board is no longer in existence.

* * *

1623 Order of Business, 11-17-36 Page 5

13. Committee on Rates, Rules and Customs.

Mr. Robert R. Otis of Atlanta, Georgia, Chairman. This Committee has 37 members from representative boards throughout the country and will hold its first meeting in connection with this convention. No specific recommendations or conclusions have been reached yet as the committee is just initiating its studies.

14. Report on the special study of license acts undertaken by Robert W. Semenow of Pittsburgh. This report will be submitted to the States Council, License Law Official, and also to the convention.

15. Resolutions in Memoriam.

During the year the following officers of the Association have passed away:

Samuel S. Thorpe, Minneapolis, Minn.—October 6, 1936

John G. Williams, Philadelphia, Pa.—September 12, 1936

T. O'J. Wilson, Bluefield, W. Va.—August 10, 1936

16. Contract with National Real Estate Journal:

Our present contract with the National Real Estate Journal provides that the Association subscribe for Realtors whose dues are paid, at a rate of $2.00 per subscription, payable quarterly in advance as payments of dues are received by the Association. This contract expires on April 30, 1937, and provides that notice of extension or renewal must be given six months in advance and that in the absence of such notice the contract will automatically lapse.

The Finance Committee has on behalf of the National Association extended the period of contract for 90-days and submits its report as to future recommended action.

17. Resumption of Publication of Annals.

Recommendations of the Finance Committee.

18. Report of Committee on Use of Forms and Contracts in Real Estate Transactions.
Alfred H. Wagg, West Palm Beach, Florida—Chairman.
19. Report of the National Committee on Real Estate Taxation and Resolution to be submitted by Tax Committee.
L. G. Palmer, Detroit, Michigan,—Chairman.

* * *

1625 *Government's Exhibit 33*

MINUTES

MEETING OF BOARD OF DIRECTORS

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS
Biltmore Hotel, New York, N. Y.—May 13th, 1937

The meeting was called to order at 2:30 P. M. by President Paul E. Stark. The following were present:

President:	Paul E. Stark, Madison, Wis.
Vice Presidents:	Charles S. Wanless, Springfield, Ill.
	Joseph W. Catharine, Brooklyn, N. Y.
	John M. Hutchinson, Waterbury, Conn.
	Robert B. Whitaker, Kenosha, Wis.
Treasurer:	Mark Levy, Chicago, Ill.
Secretary:	Herbert U. Nelson, Chicago, Ill.
Directors:	J. W. Cree, Jr., Pittsburgh, Pa.
	George Danziger, New Orleans, La.
	Edward A. MacDougall, Jackson Heights, N. Y.
	A. J. Stewart, Louisville, Ky.
	Frank C. Owens, Atlanta, Ga.
	Gilmer Richardson, Memphis, Tenn.
	James P. Mulford, Norwood, Cincinnati, O.
	Guy S. Greene, Detroit, Mich.
	Morton G. Thalhimer, Richmond, Va.
	Harry A. Taylor, East Orange, N. J.
	Frank P. Felton, Jr., Philadelphia, Pa.
	Joseph Laronge, Cleveland, O.
	Donald T. Pomeroy, Syracuse, N. Y.
	Henry G. Zander, Jr., Chicago, Ill.
	Stephen W. Sleeper, Boston, Mass.
	Harry E. Gilbert, Baltimore, Md.
	Edward G. Hacker, Lansing, Mich.
	John C. Bowers, Chicago, Ill.
	Philip W. Kniskern, Philadelphia, Pa.
	Waverly Taylor, Washington, D. C.
	C. C. Smithdeal, Winston-Salem, N. C.
	G. LeRoy Kemp, Darien, Conn.
	S. D. Walker, Keansburg, N. J.

Evan J. Miller, Harrisburg, Pa.
E. L. Ostendorf, Cleveland, Ohio
Kenneth S. Keyes, Miami, Fla.
W. E. G. Gaillard, New York, N. Y.
Earle G. Krumrine, Chicago, Ill.
Harry J. Mohlman, Cincinnati, O.
W. P. Bridges, Jackson, Miss.

Past Presidents: Walter C. Piper, Detroit, Mich
John L. Weaver, Washington, D. C.
Robert Jemison, Jr., Birmingham, Ala.
Leonard P. Reaume, Detroit, Mich.
Harry S. Kissell, Springfield, Ohio
Hugh Potter, Houston, Texas
Walter S. Schmidt, Cincinnati, Ohio

Counsel: Nathan William MacChesney, Chicago, Ill.

Others Present: John McC. Mowbray, Baltimore, Md.
—Chairman Housing Comm.
A. C. Hofrichter, Baltimore, Md.
Goodwin Gibson, Toronto, Canada
John Langtry, Chicago
Marshall Adams, New York, N. Y.
Emerson Goble, Chicago
Edouina Gano, Newark, N. J.

* * * * *

1631 Minutes, Bd. of Dir. Meeting—5-13-37—Page 7.

and By-Laws would be corrected to show this new name.

REPORT OF THE TREASURER

Treasurer Levy presented a resume of the financial statements as of April 30, 1937, copies of which appear in the Order of Business for this meeting. It was moved by Mr. Gibson, seconded by Mr. Cree and unanimously carried, that the report of the Treasurer be received and that the Treasurer be relieved of all personal liability.

REPORT OF FINANCE COMMITTEE

Chairman Laronge stated that the Finance Committee recommend to the Executive Committee that the budget for the year 1937 be increased as follows:

Furniture and Fixture account ..	$ 750.00 increase
Rent account	$ 400.00 increase
For payment of account omitted in last year's budget in connection with services of accountant's work on rates, rules and customs committee	$ 250.00
Digest account	$3,000.00 increase

The increase in the Digest account is necessary primarily because of the fact that it is now planned to publish a 48 page magazine instead of a 24-page magazine as was originally discussed.

Mr. Laronge stated that the Executive Committee had passed favorably on these recommended changes, and moved that the recommendations of the Finance Committee be adopted by this Board of Directors. Motion was seconded by Mr. Richardson and unanimously carried.

REPORT OF THE SECRETARY

Secretary Nelson reviewed his report which appeared in the Order of Business for this meeting. He stated that in the Executive Committee meeting held this morning it was suggested we are trying to do too many things, and asked that the Directors seek to limit activities along lines truly important to our business. Secretary Nelson said he had been requested by the Executive Committee to review the Association's activities and to present some estimate of what might be considered the most important things. He asked the Directors to keep this fact in mind and to suggest to him anything which it might be thought advisable to eliminate from our activities. He also solicited the interest and support of the Directors in confining our activities instead of expanding them.

REPORT OF COMMITTEE ON RATES, RULES AND CUSTOMS

President Stark stated that the Chairman of this Committee, Mr. Robert R. Otis, of Atlanta, Georgia, was unable to be present at this meeting, but that a confidential progress report of the committee was included in the Order of Business.

There ensued a discussion as to whether or not this report should be made available to member boards and State Associations. Some of the Directors felt it inadvisable to send out a report containing percentages and rates, inasmuch as the rates vary greatly in different cities.

Mr. Hutchinson moved that this report, eliminating all figures used, be sent to our Member Boards for their information and study. Motion seconded and carried

Mr. Evan Miller moved that the Secretary and Officers be permitted to send out the schedule with the understanding that it has not been approved by the National Association. Motion seconded by Mr. Kemp.

Mr. Catharine moved that the matter be tabled, with thanks to the Committee for its work. Motion seconded and carried.

Report of the Committee on the National Real Estate Foundation

Mr. Walter S. Schmidt, Chairman of the Committee, reported on the progress of the National Real Estate Foundation to date. He stated that the Committee has already secured the acceptances of several very influential men to serve as Trustees and that he is hopeful the list may be completed in the very near future.

Real Estate Finance Committee Report

Chairman MacDougall stated he was scheduled to speak at the general meeting to be held on Saturday, May 15th and would not therefore make a report at this time. He urged all of the Directors to stay over for the regional meeting to be held on May 14 and 15, and also invited them to be the guests of his company and visit their Long Island developments on Sunday, May 15th.

Report of Housing Committee

Chairman Mowbray reported briefly on the work of his committee and stated that his Committee felt its most important task was to stimulate home ownership by trying to reduce the cost of homes to individuals. He has attended several meetings in Washington and has appeared before Congress in behalf of the Committee and its work.

Report of Special Committee on Allocation of Divisional Overhead Expenses Between Divisions

President Stark called on Mr. John C. Bowers, a member of the Committee, for a report. Mr. Bowers stated that the *other member of the Committee, Mr. K. Lee Hyder,* was not present at this time and that they were not in agreement as to the amounts to be charged to each Division and Institute. After a meeting in Chicago, at which time members of the staff were interviewed regarding amount of time spent on work for each of the Divisions, Mr. Hyder felt the allocation should be somewhat different than that now in effect, while Mr. Bowers said he felt the present allocation, which is the same as that used in 1936, was fair. Mr. Bowers then indicated the present allocation and that suggested by Mr. Hyder.

President Stark suggested that the matter be referred back to the Committee for further study and report at the Pittsburgh Meeting in October.

INDUSTRIAL PROPERTY DIVISION REPORT

Chairman Stark called on Mr. Gaillard, Chairman of the Industrial Property Division, who outlined briefly the program to be put on by the Division at the Regional Meeting later in the week.

REDUCTION OF DUES IN THE INSTITUTE OF REAL ESTATE MANAGEMENT

President Taylor stated he would like to ask this Board of Directors to ratify an amendment to the Management Institute By-Laws with relation to dues payments. He said the Governing Council of the Institute had voted to reduce the dues to $25.00 a year, effective January 1, 1938.

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1635 *Government's Exhibit 31*

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS

PROGRAM OF ACTIVITIES AND BUDGET FOR 1938

For the purposes of this statement on activities and the budget, the work of the Association is grouped under the following major headings:

A. General Administration.
B. Field Work and Sales Conferences.
C. Conventions—National and Regional.
D. Library.
E. Committee Work and Policies.
F. Public Relations: Publicity and Freehold.
G. Department of Business Standards and Methods.
H. Reserve and Contingencies.

General Administration. Personnel: Executive vice-president, administrative secretary, *office manager, bookkeeper,* Kardex clerk and stenographer, secretary, 2 general stenographers, switchboard operator, mimeograph operator, and mailing-list clerk.

General administration includes the day by day tasks of collecting dues, keeping accounts, corresponding with member boards on all manner of questions, carrying on of office and mechanical work for headquarters and for its various departments, divisions, institutes, councils, and committees, under this heading the Executive Vice-President and his activities are also included.

During 1937 we added 1,312 new active members and 17 new boards. This increase in membership, plus the fact that member boards themselves have become more active, has increased the volume of correspondence which now exceeds 225 letters per day. At present it is often necessary to do night work. Office space is crowded.

During 1938 it is expected that an administrative secretary will be added to the staff and provision has been made for this in the budget. $3,000.00 has been set aside for salary on the assumption that this amount will cover approximately two-thirds of a year. Provision has also been made for adding one

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(8)

1642 With growing national interest, effect will be made to launch the Foundation in the coming months.

G. *National home building center.* Establishment of a national center for home building where institutional activities, including training for home builders can be carried on, and a national museum exhibiting all matters of interest in connection with home building can be developed, will be pressed in 1938. Plans for creation of such a center in Chicago are already far advanced. Sponsorship of important national groups including the Producers Council has been joined to our own and substantial financial interests are ready to act.

H. *Customs and charges.* During the year the Association will continue its work in assisting local boards to clarify their local schedules as to charges, to suggest the basis of charges for services not now charged for, and to develop more clearly distinctions between members and non-members in the handling of real estate transactions.

State Cn

I. *State Associations.* Importance of state association activity in obtaining legislative action to make national policies effective is growing. During the year the Association will, through the States Council and through its general committees, work actively with the State Associations in assisting them to formulate their plans and will also encourage them in undertaking the organization of new boards. It is planned also to add to the number of states included under the three-way membership agreement.

Council

J. *Replanning our cities:* Replanning and rezoning is necessary for most American communities. Neighborhood organization is a method of reviving the interest of property owners and must be pressed. Unless replanning and neighborhood activity is carried forward the structure of real estate values will suffer. Through its Housing Committee, its City Planning consultant, and its officers, the

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1649 *Government's Exhibit 35*

REPORT OF THE EXECUTIVE VICE PRESIDENT
January, 1938

MEMBERSHIP:

In January, 1937—425 Boards, 12,400 members.
In January, 1938—442 Boards, 13,280 members.

FINANCES:	1937	1936
Total General Fund Receipts, Jan. 1-Dec. 31:	$159,708.24	$150,875.77
Total General Fund Expenses, Jan. 1-Dec. 31:	157,582.15	145,922.71
Total Divisional Fund Receipts, Jan. 1-Dec. 31:	33,086.24	26,185.76
Total Divisional Fund Expenses, Jan. 1-Dec. 31:	30,678.66	26,738.66

Receipts in the General Fund for 1937 exceeded expenses by $2,126.09.
Receipts in the Divisional Fund for 1937 exceeded expenses by $2,407.58.

COLLECTIONS:

Collections have been good during 1937 and exceeded the $117,000.00 budgeted by $392.93. Standing of Member Boards is as follows:

	(Jan. 1938)	(Jan. 1937)
Boards paid in full through 1937	275	276
Boards paid through three quarters, 1937	105	92
Boards paid through first half, 1937	31	27
Boards paid through first quarter, 1937	11	12
Boards which have paid something on 1937 dues but less than one quarter	5	6
Boards paid up to January 1, 1937	9	8
Boards in arrears for dues preceding January 1, 1937	6	4
	442	425

DIVISIONS AND INSTITUTES:

Membership:

	Jan. 1938	*Jan. 1937*
American Institute of Real Estate Appraisers		
Members	545	486
Associate Members	19	17
Affiliate Members	186	193
Brokers Division	1,536	811
Farm Lands Institute	58	40
Land Developers and Home Builders Division	253	238
Home Builders Guild	24	—
The Institute of Real Estate Management	102	93
Realtor Secretaries Council	72	61
	2,795	1,939

(Industrial Property Division and National Mortgage Board disbanded by reorganization adopted at Pittsburgh Convention in October, 1937; the industrial property and mortgage interests will still retain their identification as the Industrial Property Council and the Mortgage Council, with no dues.)

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1653 Report of Exec. Vice Pres.—Jan. 1938—Page 5.

LIBRARY:

The library reads, clips and indexes 144 periodical publications and 39 newspapers from all over the country. Our collection of books now totals 2,237 volumes. Information on real estate subjects is kept under 3,300 different headings. Member boards and individual Realtors draw extensively upon our library for all sorts of information.

The library also makes special studies and compilations. In preparation now is a Manual on State Association Activities (similar to the one on real estate board activities prepared in 1937). Our members are much interested now in new books, magazines, and studies on real estate and its allied subjects. A selection of the 25 best books available on real estate subjects for recommendation to Realtors is now being made.

During 1937, 370 books were sold by the Association, as against 247 during 1936.

TRAVEL:

President Stark will have travelled some 40,000 miles in visiting over 40 boards and state associations and 9 re-

gional meetings. He was the first National President to visit our Honolulu Realty Board while in office. President Stark's visits have been invaluable in building understanding of the Association's work and especially of the many new projects brought forward during his Administration and in strengthening membership loyalty.

During 1937 I spent over a fifth of my time in travel on Association policies and work and in visiting 30 Member Boards and state associations. Constant contact with our members and discussion of current problems with them must be continued.

REAL ESTATE FINANCE COMMITTEE:

Edward A. MacDougall of Jackson Heights, New York, continues as Chairman of this Committee. The Committee has consistently pressed for the establishment of adequate discount facilities for mortgages through a central mortgage bank. It may be that the mortgage associations under F.H.A. will become in fact a form of mortgage bank, and we have supported amendments to the F.H.A. which would make such mortgage associations more workable. The Committee will continue to seek to have the Wagner-Pepper Bill creating a Central Mortgage Bank reported out favorably by the Senate Committee on Banking and Currency at this session of Congress.

HOUSING COMMITTEE:

John McC. Mowbray of Baltimore, Md., will continue as Chairman. The Committee during 1938 will cooperate with Government in seeking to find workable and practical plans for curing blighted areas and creating decent low-cost housing in a way that will be constructive and helpful to private enterprise. Our suggestion with reference to public utility housing companies will be pressed.

The Neighborhood Improvement Act has been revised in accordance with suggestions and criticisms received from city planners and others interested and is being given out for study again. It is expected it will be introduced in a number of state legislatures this spring.

COMMITTEE ON RATES, RULES & CUSTOMS

Robert R. Otis, Chairman. Rationalization of rates, rules, and customs for the real estate business in developing state by state in line with the national

1654 Report of Exec. Vice Pres.—Jan. 1938—Page 6

program. This year President Catharine is appointing a nation-wide committee composed of a representative from each state. This committee will assist local boards in clarifying their local schedules both as to charges and as to services for which charges should be made and in developing clearer distinctions between members and non-members in the matter of division of commissions.

COMMITTEE ON REALTORS' LEGAL RIGHTS:

Morris Goldfarb of Perth Amboy, New Jersey, has accepted the chairmanship of this new national committee on the matter of Realtors' legal rights to do business according to custom and to defend these rights against the attacks by the lawyers and state and local bar associations. The committee will act as a clearing house for information on this matter and will cooperate in such ways as it can with the state associations. Each state association has been asked to select a representative on the national committee.

COMMITTEE ON SOCIAL, STATE, AND NATIONAL DUES:

John C. Bowers of Chicago, Illinois, will continue to act as chairman of this Committee, which is trying to find some plan of dues which will be equitable and fair for both large and small firms. Study is being given to the possibility of having some form of membership for salesmen and the requirement that all salesmen employed by Realtors, after a specified time, belong to local, state and national organizations.

1655 *Government's Exhibit 36*

REPORT OF THE EXECUTIVE VICE PRESIDENT
January, 1939

MEMBERSHIP:

In January, 1938—442 Boards, 13,280 members.
In January, 1939—459 Boards, 14,100 members.

The Association begins 1939 with 820 more members than it had at the beginning of 1938.

FINANCES:

	1938	*1937*
Total General Fund Receipts, Jan. 1-Dec. 31	$156,475.89	$159,708.24
Total General Fund Expenses, Jan. 1-Dec. 31	149,044.67	157,582.15
Total Divisional Fund Receipts, Jan. 1-Dec. 31	56,955.53	33,086.24
Total Divisional Fund Expenses, Jan. 1-Dec. 31	59,498.93	30,678.64

Receipts in the General Fund for 1938 exceeded expense by $7,431.22.

Receipts in the Divisional Fund for 1938 exceeded expenses by $6,456.63.

COLLECTIONS:

Dues receipts for 1938 exceeded the budgeted amount ($122,000) by $2,204. Collections held steady with 1937 collections during the first ten months and then showed a marked increase during the latter half of November and December. Standing of Member Boards is as follows:

	Jan., 1939	(Jan., 1938)
Boards paid in full through 1938	276	275
Boards paid through three quarters, 1938	118	105
Boards paid through first half, 1938	38	31
Boards paid through first quarter, 1938	6	11
Boards which have paid on account but less than one quarter, 1938 dues	2	5
Boards paid up to January 1, 1938	3	9
Boards in arrears for dues preceding Jan. 1, 1938	16	6
	459	442

DIVISIONS AND INSTITUTES:

Membership:

	Jan., 1939	Jan., 1938
American Institute of Real Estate Appraisers		
Members	596	545
Associate Members	20	19
Affiliate Members	130	186
Brokers Division	1,762	1,536
Farm Lands Institute	52	58
Land Developers and Home Builders Division	241	253
Home Builders Guild	25	24
The Institute of Real Estate Management		
Organization Members	130	102
Individual Members	265	
Realtor Secretaries Council	90	72
	3,311	2,795

Technical Journals:

The Journal of the American Institute of Real Estate Appraisers: Paid circulation, Jan. 1, 1938—1769; Jan. 1, 1939—1420.

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Committee on Real Estate Finance. Mr. Edward A. MacDougall has agreed to continue as Chairman. The committee is working for the amendment of Title III of the National Housing Act to provide that all bonds and debentures issued by mortgage associations chartered by F.H.A. shall be the common obligations of all the mortgage associations so chartered. This would make of the mortgage associations the type of central mortgage bank long advocated by the Association.

Committee on Rates, Rules, and Customs. Mr. Paul S. Bomberger of Modesto, California, will chairman this important committee during 1939. Mr. Bomberger has had gratifying success in his state in having more than forty boards adopt the standard rates recommended by his state committee. The movement for standardizing commission schedules throughout the country is growing rapidly and several state associations are now working in this direction. The establishment of more reasonable and uniform methods of compensation for Realtors' services on a national basis, with allowances for varying regional conditions and requirements, is one of the most important tasks which the Association can perform for its members.

Committee on Realtors' Legal Rights. Mr. Clifford W. McKibbin of Lansing, Michigan will act as chairman of this committee during the coming year. We have been able to clarify our attitude with the American Bar Association a great deal since the adoption of a clear statement of our position and policy on matters involving the legal rights of Realtors worked out by our committee last year, under the chairmanship of Morris Goldfarb of New Jersey. At the present time we are carrying on conferences with the chairman of the American Bar Association's committee on the unauthorized practice of law and have agreed to work out a clearing house arrangement whereby all cases involving improper activities by either Realtors or lawyers will be reviewed by the two national committees before any litigation or contentious actions are undertaken. We are recommending to Member Boards that they hold conferences with the local bar associations in an effort to clear up any differences without action in the courts, and the American Bar Association will make the same recommendation to the local bar associations.

The only spot where the difficulty has not been ironed out is in Cleveland, where a local bar association has brought injunction proceedings against a number of real estate men.

Committee on Metropolitan Boards. President Catharine has agreed to assume the chairmanship of this newly created committee whose basic problem seems to be that of finding some method of recognizing the existence of important neighborhood or sectional interests in large metropolitan centers. The solution may lie in the establishment of branch boards. This plan is now being studied in Chicago.

Committee on Local, State and National Dues. John Bowers, Chairman. There is no progress to report in the solution of the difficult task which this committee has before it. The report of the Committee approved by the Directors at their meeting in Richmond in May, 1938, was sent to all Member Boards, but we have not had a very large response to the suggestions developed in the report.

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1662 *Government's Exhibit 37*

MINUTES OF MEETING OF BOARD OF DIRECTORS
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS
Congress Hotel, Chicago, Ill.

May 6, 1939

The meeting was called to order at 10:00 A. M. by President E. L. Ostendorf.

The following Directors and Officers were present:

E. L. Ostendorf, Cleveland, Ohio—President
Charles S. Wanless, Springfield, Ill.—Treasurer
Leroy C. Ackley, Los Angeles, Calif.
H. Clifford Bangs, Washington, D. C.
John C. Bowers, Chicago, Ill.
J. W. Catharine, Brooklyn, N. Y.
Myers Y. Cooper, Cincinnati, Ohio
J. W. Cree, Jr., Pittsburgh, Pa.
James C. Downs, Jr., Chicago, Ill.
Newton C. Farr, Chicago, Ill.
Ralph V. Field, Galesburg, Ill.
Guy S. Greene, Detroit, Mich.
Hugo J. Hesse, Detroit, Mich.
Kenneth S. Keyes, Miami, Fla.

Glade R. Kirkpatrick, Tulsa, Okla.
Philip W. Kniskern, Philadelphia, Pa.
Phil W. McMahon, Tulsa, Okla.
John McC. Mowbray, Baltimore, Md.
James P. Mulford, Norwood, Ohio
Donald T. Pomeroy, Syracuse, N. Y.
Hugo Porth, Milwaukee, Wis.
Hugh Potter, Houston, Texas
Leonard P. Reaume, Detroit, Mich.
Wm. T. Richardson, Santa Monica, Calif.
Walter S. Schmidt, Cincinnati, Ohio
David B. Simpson, Portland, Ore.
George C. Smith, St. Louis, Mo.
Freas B. Snyder, Upper Darby, Pa.
Paul E. Stark, Madison, Wis.
Fred E. Taylor, Portland, Ore.
Morton G. Thalhimer, Richmond, Va.
Lovell Turner, Dallas, Tex.
Robert B. Whitaker, Kenosha, Wis.
Cyrus Crane Willmore, St. Louis, Mo.
Henry G. Zander, Jr., Chicago, Ill.
H. U. Nelson, Chicago, Ill.—Executive Vice President
George P. Ellis, Chicago, Ill.—Comptroller
Nathan William MacChesney, Chicago, Ill.—Counsel

The following persons were also present during a part of the meeting:

Paul C. Loeber, Chicago, Ill.—President of Chicago Board
Paul S. Bomberger, Modesto, Calif.—Chairman of Committee on Rates, Rules and Customs
Parker Webb, Boston, Mass.
Joseph B. Hall, Cleveland, Ohio
Charles F. Curry, Kansas City, Mo.
Alvin B. Cates, Atlanta, Ga.
John C. Langtry, Chicago, Ill.—National Real Estate Journal
Emerson Goble, Chicago, Ill.—National Real Estate Journal

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1671 Minutes, Meeting of Board of Directors, 5-6-39—Page 10.

A Committee consisting of Mr. Mowbray, Mr. Stark, Mr. Thalhimer, Mr. Guy S. Greene, Mr. Pomeroy and Mr. Schmidt prepared a revision of Recommendation No. 3, and it was moved by Mr. Mowbray that this revision be adopted, with the proviso that the officers reconstruct the English and make any minor changes necessary. Motion seconded by Mr. Bowers and unanimously carried.

The report of the Committee on Housing and Blighted Areas, as amended and adopted by the Board of Directors, appears beginning page 17.

The Directors recommended that the Committee continue its studies of the problem of public housing financed by U.S.H.A.

Report of Committee on Rates, Rules, and Customs

President Ostendorf asked Mr. Paul S. Bomberger, Chairman, to present the report of the Committee. A copy of the tabulations presented by Mr. Bomberger appears on pages 21-25.

Mr. Reaume stated he thought the committee should be highly commended for their work in presenting this fine compilation of rates. He said there is no doubt but that this is a good, constructive piece of work, and will enable the Directors to go back to their respective Boards and suggest adjustment of rates by pointing out that higher rates are being obtained in other cities for the same type of services. Mr. Reaume then moved that a vote of thanks be given to Mr. Bomberger and his Committee. Motion seconded and unanimously carried.

Report of Committee on Relators Legal Rights

President Ostendorf asked Mr. Farr to present the report of this Committee, in the absence of the Chairman, Mr. McKibbin.

Mr. Farr read the report in full and stated that if it is approved, it will then go back to the Chairman of the Committee who will arrange a meeting with the Bar Association's Committee.

Mr. Farr moved the adoption of the report. Motion seconded and unanimously carried.

The report, as adopted, BUT WHICH IS PRESENTLY TO BE TREATED AS CONFIDENTIAL, follows:

Tentative Draft of
A Statement of Principles
For Consideration by
Committees of
the American Bar Association
and the
National Association of Real Estate Boards

WHEREAS, it is in the interest of the public and of mutual interest to lawyers and Realtors that their national, state, and local organizations co-operate in dealing with matters affecting real estate, and,

WHEREAS, it is desirable that the activities and functions appropriate to the calling of the lawyer and of the Relator be complementary and harmonious,

NOW, THEREFORE, the American Bar Association and the National Association of Real Estate Boards, acting through their governing bodies, do hereby

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1678 *Government's Exhibit 38*

REPORT OF THE EXECUTIVE VICE PRESIDENT

May, 1939

MEMBERSHIP:

In May, 1938—445 Boards, 13,380 members.
In January, 1939—459 Boards, 14,100 members.
In May, 1939—462 Boards, 13,805 members.

Since the January meeting, 5 Boards having 47 total members have applied for membership.

FINANCES:

The General Fund receipts for the period January 1—March 31, 1939, totalled $51,569.56 and General Fund expenses for the same period totalled $38,737.19.

The Divisional Fund receipts for the period January 1—March 31, 1939, totalled $38,748.31, with total Divisional Fund expenses for the same period amounting to $16,399.88.

COLLECTIONS:

The Association's officers are using every effort to get the boards in arrears back in good standing. Standing of Members Boards as of April 15 is as follows:

	May, 1939	*(May, 1938)*
Boards paid in full through 1939	48	56
Boards paid through three quarters, 1939	14	13
Boards paid through first half, 1939	125	105
Boards paid through first quarter, 1939	115	94
Boards which have paid something on 1939 dues but less than one quarter	37	61
Boards paid up to January 1, 1939	82	78
Boards in arrears for dues preceding January 1, 1939	41	38
	462	445

Divisions and Institutes:

Membership:

	April 15 1939	April 15 1938
American Institute of Real Estate Appraisers		
Members	630	564
*Associate Members	—	22
*Affiliate Members	—	138
Brokers Division	1903	1532
Farm Lands Institute	60	55
Land Developers & Home Builders Division	220	206
The Institute of Real Estate Management		
Organization Members	135	101
Individual Members	282	
Realtor Secretaries Council	100	85
	3330	2703

*The amendments to the Appraisal Institute's By-laws adopted in January of this year eliminated the associate and affiliated memberships. The associate members were automatically admitted to the Member Grade and the affiliate members were transferred as subscribers to the Institute's Journal.

Technical Journals:

The names of the two quarterly magazines published by the Appraisal Institute and the Management Institute have been changed to the "Appraisal Journal" and "The Journal of Certified Property Managers". The covers and general makeup of both Journals have been given a more modern appearance, and both Institutes are making a concerted effort to widen the circulation of their respective magazines.

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1684 Report of the Executive Vice President, May 1939—Page 7

Committee on Rates Rules, and Customs: The local schedules of charges for Realtors' services will be studied by this committee at its first meeting this year to be held in Chicago on May 4, under the chairmanship of Paul S. Bomberger of California. A special compilation has been made for the Committee's study of the varying rates in effect in cities over 100,000 population. It is hoped that the work of this Committee will result in a report which will be helpful to Member Boards in revising their schedules.

Committee on Commercial Districts. The Committee on Commercial Districts, under the Chairmanship of Walter S. Schmidt of Cincinnati, will hold its first

meeting in Chicago on May 6, to study the problems of business districts. Among the subjects to be considered by the Committee are: amount of land zoned for business uses; proper distribution and spacing of business centers; planning of future buildings so as to include automobile parking facilities; elimination of too blatent advertising and the litter of overhead signs; present business leasing policies; restrictions on building heights.

National Committee on Real Estate Taxation: This committee, under the leadership of Chairman Myers Y. Cooper, has been holding meetings at the regional conferences this year to discuss ways in which the Committee's activities can be of help to the various committee members in advancing the Association's five-point tax program, and to learn what is being done in the various communities and states to obtain complete adoption of the program.

The Committee's activities are centered on real estate tax limitation and the mandatory consideration of productivity or income in real estate valuations for tax purposes—two major points in the program.

No further progress has been made on the formation of a National Real Estate Tax Bureau due to lack of commitments from participating organizations in the way of financial support.

Committee on Metropolitan Boards. Chairman Joseph W. Catharine and his committee are giving thoughtful study to the proposal for creating branches of the central board in large cities as a means of recognizing important neighborhood factors and influences. The plan is being actively discussed in Chicago.

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1685 *There was no Exhibit 39*

1686 *Government's Exhibit 40*

REPORT OF THE EXECUTIVE VICE PRESIDENT
October, 1939

MEMBERSHIP:

In October, 1939—462 Boards, 13,749 members.
In January, 1939—459 Boards, 14,100 members.
In October, 1938—458 Boards, 13,618 members.
During the year of 1939, 9 Boards having a total of 105 members have been added to membership rolls.

FINANCES:

Expenditures and Receipts have been in accordance with the budget. General and Divisional Fund receipts and expenses are given in the financial statement for the first nine months of the year attached to the order of business, as follows:

	1939	*1938*
Total General Fund Receipts, Jan. 1-Oct. 1	$121,385.54	$113,687.14
Total General Fund Expenses, Jan. 1-Oct. 1	117,125.47	108,812.58
Total Divisional Fund Receipts, Jan. 1-Oct. 1	65,912.81	49,977.85
Total Divisional Fund Expenses, Jan. 1-Oct. 1	54,354.72	38,753.49

COLLECTIONS:

Dues collections for the first nine months of 1939 ran higher than for the same period last year and are in line with budget expectations. Following is the standing of Member Boards in the payment of their membership dues: (Standing of Member Boards at same time last year is given in right-hand column.)

Boards paid in full through 1939	146	183
Boards paid through three quarters, 1939	113	119
Boards paid through first half, 1939	141	102
Boards paid through first quarter, 1939	33	19
Boards which have paid something on 1939 dues but less than one quarter	5	3
Boards paid up to January 1, 1939	12	7
Boards in arrears for dues preceding January 1, 1939	12	25
	462	458

DIVISIONS AND INSTITUTES:

Membership:	*Oct., 1939*	*Oct., 1938*
American Institute of Real Estate Appraisers—		
Members	638	564
Junior Members	6	—*
Brokers Division	2,240	1,634
Farm Lands Institute	51	51
Land Developers and Home Builders Division	194	229
The Institute of Real Estate Management—		
Organization Members	137	104
Individual Members	316	202
Realtor Secretaries Council	97	97
	3,679	2,871

*Junior Membership in the Appraisal Institute was not created until January, 1939, at which time the Appraisal Institute's associate and affiliate members were automatically admitted to Member Grade, transferred as subscribers to the Journal, or dropped from membership.

Technical Journals:

The Appraisal Journal: Paid circulation, October 1, 1938—1,743; January 1, 1939—1,420; April 15, 1939—1,524; October 1, 1939—1,697.

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1693 Report of the Executive Vice President—October, 1939—Page 8.

meeting in connection with the Los Angeles convention. There has been nation-wide interest in the committee's work, as the problem of decentralization as it affects our business districts is assuming more threatening proportions constantly. During the summer, the Committee conducted a survey among themselves as to just what material and statistical data is already available which is directly related to some of the problems confronting the Committee.

Committee on Housing and Blighted Areas. This Committee, under the chairmanship of Joseph Greenberg of Philadelphia and Vice Chairmanship of John McC. Mowbray of Baltimore, has done some very effective work during the year. It has held two meetings, in Washington, and its report was approved by the Directors at their last meeting. The Committee and its members are actively seeking to eliminate direct building by the Government and are trying to bring about cooperation between various Governmental agencies concerned with housing and private enterprise in slum clearance projects. Two proposals developed by the Committee—the neighborhood improvement district act and the public utility building company act—were introduced in a number of state legislatures this year, and the Committee is hopeful that they will be enacted into law next year in some of the states.

Committee on Metropolitan Boards. Joseph W. Catharine, Chairman, and his Committee will hold their first meeting of the year in connection with the Los Angeles Convention. A proposal for creating branches of the central board in large cities is being studied by the Committee and is the only suggestion so far evolved for recognition of neighborhood factors and influences by the large metropolitan boards.

Committee on Rates, Rules, and Customs. Chairman Paul Bomberger and his Committee have issued a guide on rates, rules, and customs to all Member Boards, and many congratulatory comments have been

received. Any suggestions for revisions or improvements in the study will be considered by the Committee at its meeting in Los Angeles. There has been a big demand for help of this kind from a number of Boards which are interested in revising their schedule and bringing it up to date in accordance with the latest national thought and practice.

Committee on Real Estate Finance. The Committee's objective of having Federal agencies concerned with real estate financing consolidated was effected by the Government reorganization bill passed by Congress which created a Federal Lending Administrator in charge of all Federal lending agencies. The Committee, under the able leadership of Edward A. MacDougall, keeps a close watch on all Federal legislation concerned with real estate financing. Senator Wagner's bill creating a Federal Mortgage Discount Bank was not passed.

Committee on Realtor's Legal Rights. Chairman McKibbin and his Committee submitted a statement of principles on which both lawyers and Realtors might agree, approved by the Directors, to the Committee on the Unauthorized Practice of Law of the American Bar Association last May, but as yet the Bar Association's Committee has not issued any commitment. Mr. McKibbin is following this matter closely and is endeavoring to secure the acceptance of this set of principles so as to do away with litigation and threats of litigation in the future in this field. Several new cases of litigation have developed during recent months, all of which the Committee is following and investigating where necessary. In one case, in Duluth, the Association, at our General Counsel's recommendation, has agreed to enter into the case, and our Counsel will assist in the presentation of arguments. The decision by the lower court in this case is based upon the Gore decision in Ohio, and it has seem necessary, therefore, that the Association use its efforts to help bring about a reversal of the lower court's decision.

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1695 *Exhibit 11* was withdrawn

1696 *Government's Exhibit 42*

REPORT OF THE EXECUTIVE VICE PRESIDENT MAY, 1940

MEMBERSHIP:

In May, 1939—462 Boards, 13,805 members.
In January, 1940—464 Boards, 13,844 members.
In May, 1940—458 Boards, 14,472 members.
In one year, the Association has gained almost 700 members.

FINANCES:	*1940*	*1939*
Total General Fund Receipts, Jan. 1-April 30:	$69,636.08	$64,492.99
Total General Fund Expenses, Jan. 1-April 30:	67,863.54	54,440.88
Total Divisional Fund Receipts, Jan. 1-April 30:	51,600.67	43,914.08
Total Divisional Fund Expenses, Jan. 1-April 30:	27,210.28	24,295.24

COLLECTIONS:

In general, collections have been very good during the first four months of 1940, and are ahead of collections for the same period last year. There are 32 Boards, however, which have been classified as delinquent, and the Association's Officers are endeavoring to get these Boards back in good standing. Following is the standing of Member Boards as to dues payments:

	April 30, 1940	*(April 30, 1939)*
Boards paid in full through 1940	47	48
Boards paid through three quarters, 1940	25	14
Boards paid through first half, 1940	141	125
Boards paid through first quarter, 1940	117	115
Boards which have paid something on 1940 dues but less than one quarter	41	37
Boards paid in full to January 1, 1940	55	82
Boards in arrears for dues preceding January 1, 1940	32	41
	458	462

DIVISION AND INSTITUTES:

Membership:

	April 30, 1940	*(April 30, 1939)*
American Institute of Real Estate Appraisers		
Members	668	631
Junior Members	18	—
Brokers Division (includes Farm Land Institute)	2,652	1,995
Land Developers and Home Builders Division	195	217
The Institute of Real Estate Management		
Organization Members	142	135
Individual Members	360	284
Secretaries Council	113	102
Total	4,148	3,364

Technical Journals:

The Appraisal Journal: Paid circulation April 30, 1940—1,676; January 1, 1940—1,730; April 15, 1939—1,524.

The Journal of Certified Property Managers: Paid circulation April 30, 1940—660; January 1, 1940—648; April 15, 1939—574.

Real Estate Courses:

The American Institute of Real Estate Appraisers repeated its case-study Appraisal I Course at Tulane University in New Orleans February 12 to March 9 this year and also gave Appraisal II, with total enrollment of 69 students.

The Institute's Extension Courses have been or are being given in three cities:

* * * * *

1702 Report of the Executive Vice President, May, 1940—Page 7

COMMITTEES:

Committee on Housing and Blighted Areas, Arthur W. Binns, Chairman. This Committee has held two very successful meetings this year in Washington, D. C., attended by about thirty people representing all parts of the country and cities of all sizes. The Committee has recommended: (a) that U. S. H. A. should not finance the construction of any additional housing projects to be owned and operated by local housing authorities; (b) that U. S. H. A. pay normal local taxes on existing projects; (c) that only families of the lowest income group now living in unfit dwellings be admitted to U. S. H. A. projects; (d) that rent relief be given to families instead of to the projects themselves; (e) that all Member Boards urge upon local governments enforcement of existing legal minimum standards with respect to safe and decent housing; and (f) that U. S. H. A. be altered so that it may charter and assist redevelopment companies, privately owned and managed, which would undertake to rehabilitate and rebuild blighted areas. The plan for creating redevelopment companies is discussed in the Committee's full report which will come before the Directors for approval (copy attached to order of business).

Committee on Realtors' Legal Rights, Clifford W. McKibbin, Chairman. A meeting of this Committee was held in Cleveland on April 6. At the Committee's re-

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quest, a representative of the American Bar Association's Committee on the Unauthorized Practice of Law appeared. He indicated that the Bar Association would like to develop a workable program with Realtors, although they state they cannot agree to give Realtors the right to draw any papers. Our Committee feels that the recent Minnesota Supreme Court decision, in which the court held that lawyers should not seek to infringe upon established business practices, strengthens the Realtors' hand considerably. The Committee approved for further study the so-called Wisconsin plan, which embodies some sixty statutory forms adopted by the legislature and a law definitely allowing Realtors to prepare their own contracts. Latest development in this field is in Cleveland, where 22 real estate men, including Past President Alexander S. Taylor, have been cited for "unauthorized practice." Mr. Taylor's case is now being heard in the county court.

Committee on Rates, Rules, and Customs, Paul S. Bomberger, Chairman. Last year this Committee completed a "guide" on commission rates which has been issued to all Member Boards and State Associations. The matter of uniform commission rates is now being discussed and studied in an increasing number of boards as a result of the Committee's work. In many cities of the same size and similarly located a wide variancy exists in their schedules, and Chairman Bomberger's committee is seeking to stimulate their correlation.

Committee on Commercial Districts, Walter S. Schmidt, Chairman. The work of this Committee has been directed to a study of decentralization. The Committee has cooperated with the Urban Land Institute in collecting over 500 reports covering 221 cities which have now been summarized and printed by the Urban Land Institute as a preliminary report showing the problem that exists and its causes.

Committee on Federal Wages and Hours Legislation, William E. Malm, Chairman. This committee has not yet held a meeting and has not, therefore, formulated any recommendations. A bill has been introduced in Congress (H. R. 9527) by Representative Alexander of Minnesota that would exempt office or loft building and apartment house maintenance or service employees by definite legislative action from the Fair Labor Standards Act, whether

or not the owner of the office or loft building is otherwise engaged in interstate commerce.

National Committee on Real Estate Taxation, Myers Y. Cooper, Chairman. The attention and effort of this Committee has been centered largely in the first National Conference on Real Estate Taxation, held in Washington last month. Chairman

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1704 *Government's Exhibit 43*

REPORT OF THE EXECUTIVE VICE PRESIDENT
January 1942

MEMBERSHIP:

In January, 1941—466 Boards; 14,391 Members.
In January, 1942—475 Boards, 15,158 Members.

Although we start the year with an increase of 767 members over a year ago, it is believed that the coming year may see a loss in membership due to the fact that more and more of the younger men are being drawn into war activities. Our budgeted receipts have accordingly been reduced for the coming year.

FINANCES:

Some of the expenditures during 1941 ran beyond budget expectations due mostly to developments in Washington and the necessity of keeping a much closer contact with the Federal Government. Following is a comparison of 1941 receipts and expenses with those of the preceding year:

	1941	*1940*
Total General Fund Receipts, Jan. 1-Dec. 31:	$192,954.88	$167,471.49
Total General Fund Expenses, Jan. 1-Dec. 31:	189,332.57	163,391.35
Total Divisional Fund Receipts, Jan. 1-Dec. 31:	97,723.24	89,906.45
Total Divisional Fund Expenses, Jan. 1-Dec. 31:	94,352.47	82,050.95

COLLECTIONS:

Dues receipts throughout 1941 were excellent and have held up well during the first weeks of 1942. Our delinquency picture has never been better and practically all of our Boards are now paying dues on a current basis. Status of Member Boards as to payments is given below, together with a comparison with their standing at the same time last year:

	Jan. 1, 1942	Jan. 1, 1941
Boards paid in full through 1941	313	287
Boards paid through three quarters, 1941	111	124
Boards paid through first half, 1941	29	33
Boards paid through first quarter, 1941	14	8
Boards which have paid on account but less than one quarter, 1941 dues	2	2
Boards paid up to January 1, 1941	3	4
Boards in arrears for dues preceding January 1, 1941	3	8
	475	466

DIVISION AND INSTITUTES:

Membership:

	Jan. 1, 1942	Jan. 1, 1941
American Institute of Real Estate Appraisers:		
Members	814	697
Junior Members	40	26
Brokers Division	2,876	2,834
Home Builders Institute of America	408	190
The Institute of Real Estate Management:		
Organization Members	144	145
Individual Members	444	403
Society of Industrial Realtors:		
Individual Members	209	—
Firm Affiliates	16	—
Salesmen Affiliates	13	—
Secretaries Council	123	120
	5,087	4,415

* * *

1710 Report of the Executive Vice President for January, 1942. Meeting—Page 7.

COMMITTEES:

Committee on Housing and Blighted Areas: Arthur Binns continues as the head of this important Committee, which will hold its first meeting during 1942 on February 13 and 14. The Committee is working closely with the Urban Land Institute on its proposal for replanning our cities and rebuilding their blighted areas as a post-war measure. The Committee's program is being closely studied by a number of Federal departments and is receiving general approval. The Committee's membership has been somewhat enlarged so as to be more representative of the whole country and in addition has a number of people representing varied interests serving as consultants.

Committee on Rates, Rules and Customs: Boyd T. Barnard of Philadelphia, who will continue as Chairman during 1942, has endeavored throughout the past year to obtain from as many of the Boards as possible information concerning prevailing schedules and contemplated changes, and this information has been assembled and catalogued. As a result of the Committee's activities many Boards are making complete studies of their existing schedules with a view towards changing them to conform as nearly as possible with the suggested National guide. It is interesting to note that the Boards which are changing their schedules are revising upwards.

Rental Emergency Committee: James C. Downs of Chicago will continue to head this Committee during 1941. He has been in close contact with Mr. Karl Borders, in charge of the Rent Section for OPM. His committee is continuing to urge Member Boards to set up fair rent committees in an effort to forestall the imposition of rent control by law. It is expected that his committee may have a chance to assist in working out the administrative provisions for the rent control section of the general price control bill which will probably be passed. In this way we may be able to assure our Members and property owners generally of as fair treatment as possible.

Committee on Realtor: Roland R. Randall of Philadelphia rendered most valuable service to this Committee during 1941 and will continue to chairman it during the coming year. This committee now consists of 450 members representing an equal number of our Member Boards. The Committee's efforts have already produced real results. It will continue its program of promotion of the term "Realtor" in all of the cities where we have representation. A monthly letter of suggestions for new uses and ways of promoting the term will be sent to all Committee members. The comprehensive manual on the term "Realtor" developed by the Committee last year is resulting in many newspaper campaigns and other forms of promotion.

Committee on Realtor's Legal Rights: Clifford W. McKibbin of Lansing, Michigan, will continue to serve the Committee as Chairman. There have not been any recent disputes that have come to our attention where Realtors have been accused or involved in the unauthorized practice of law. On the whole, Realtors have been decidedly successful in the court cases that have been brought.

Committee on By-Laws: Paul E. Stark, Chairman, and his committee have been giving much thought to developing uniform definitions of membership classifications which will be acceptable to our Member Boards and Institutes and Divisions. It is a tangled problem and the committee would appreciate any suggestions which our Directors or Members have to offer.

• • •

1712 *Exhibit 44* was withdrawn

1713 *Exhibit 45* was withdrawn

1714 *Exhibit 46* was not offered

1716 *Exhibit 47* was not offered

1717 *Government's Exhibit 48*

NATIONAL ASSOCIATION
OF REAL ESTATE BOARDS

HERBERT U. NELSON
Executive Vice President
22 West Monroe St.
Chicago, 3

1737 "K" Street, N. W.
Washington 6, 1946
February 27, 1946

Mr. A. R. Saunders
Lansing, Michigan

Dear Bert:

President Barnard has appointed you a member of our Rates and Rules Committee, which is to be headed by Daniel F. Sheehan of St. Louis. Our plan is that each of our Institutes shall nominate one man to serve on this Committee. The Secretaries Council has nominated you, and President Barnard has therefore appointed you.

The task of this Committee is to seek to bring increasing order out of the somewhat confused rules of our Member Boards with reference to fees, commissions, and charges for services. This can be done by seeking uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of the charge.

The Committee has already made one report of which I enclose a copy. Now that the war is over, this work should be continued for the benefit of Realtors everywhere.

In dealing with the Federal Government, there is, of course, great advantage in having logic and some uniformity in our charges. In the case of management fees, the government can see little point in paying twice as much in one community as in another. Some of the larger insurance companies have also made the same comment.

Generally speaking, most Boards have charges which are probably too low in relation to present costs of doing business. Often a Board will hesitate to increase its charges, fearing to lose business. If all Boards can act together, each individual Board will gain confidence and strength from such action.

It is hoped that you will be willing to serve on this Committee, which will have its first meeting in Chicago on Wednesday, May 8, at the Congress Hotel. This meeting will last all day and will begin at 10 a. m. Please come if you can.

Sincerely,

HERB NELSON
Executive Vice President

Enclosure

1718 *Government's Exhibit 49*

For the Information of:
Mr. Nelson.
2

June 26th, 1946.

Mr. Lon Forbush,
Executive Secretary,
Seattle Real Estate Board, Inc.,
1411 4th Avenue Bldg.,
Seattle 1, Washington.

My dear Mr. Forbush:

In re: NAREB—Local Commission Schedule.

Your letter of June 12th addressed to Mr. Ellis went to the office of the National Association, then to Mr. Ellis and from him to me so that I may write you my impressions on the question you raise.

The question which you raise is somewhat difficult to discuss and I think one which it is not advisable to discuss publicly at all. It had to do with an inquiry by the Department of Justice, both at the NAREB office in Chicago and in Washington and the Washington, D. C. Bureau Office regarding a possible "restraint of trade" involved in agreed schedules of charges.

This question is not confined to the real estate boards but has been frequently discussed by bar associations. The bar associations have never attempted to have a binding agreement upon its members, but has only standard charge schedules or fee schedules.

It is my judgment that there is a possible danger of criticism and even of adverse action if the government became convinces that it was a rigid agreement as to charges and the division of commissions between members and non members. It is my thought that standard schedules should be included as a guide to members of the association and compliance therewith should be had by the pressure of opinion within the Board. As a matter of fact while the schedules are used both by the members and by the courts as a guide to what is a fair charge, there are very few cases of expulsion from Boards for failure to observe them. It is this latter action which might cause trouble. Under all the circumstances I am not in a position to advise you what you should do but if it were left to me I would head any schedule of charges something like the following:

1719

"Standard Commission Schedule recommended by the Seattle Real Estate Board", or

"Standard Commission Schedule used by the Seattle Real Estate Board".

The language in this preliminary statement "shall be observed by every member" indicates that failure to do so may be followed by some penalty. My recommendation is and always has been that the commission rates should be attached to, but not a part of the by-laws, for the failure to observe such rates would not then result in compulsory action and instead of the statement "shall be observed by every member" some such language as "is regarded as being a fair standard of compensation for services rendered to be generally observed in the absence of a written agreement to the contrary.

I am,

Very truly yours,

NATHAN WILLIAM MACCHESNEY
General Counsel

Exhibit 50 was not offered

Government's Exhibit 51

March 20, 1946

Realtor Daniel F. Sheehan
6401 Manchester Avenue
St. Louis, 10, Missouri.

Dear Dan:

Just as I was about ready to ship to you my entire file on the subject of Rates, Rules and Customs, I received a letter from Miss Jones, requesting that I forward all this data direct to her in Chicago. This I have done.

The only file I did not forward to her was that file of personal correspondence from the committee and others direct to me. This file I am forwarding to you under separate cover.

I am enclosing herewith the three major steps of our program last year. The *first pamphlet* sent out was a sample schedule of commissions and charges which we felt would be a good guide to the many new Boards being organized, and also a reminder to a lot of the older Boards to study their own schedule and revise it, if needed. The *second pamphlet* was a sample on arbitration procedure and this, likewise, went to every Board in the country, which certainly establishes a fine guide showing forms of how Boards should proceed under their Arbitration Committee. The *third and last pamphlet* was on decisions rendered during a year by an Arbitration Committee.

The above program was felt much needed in order that harmony and good feeling could exist among Board members in having a proper schedule—in having a friendly procedure to arbitrate honest differences among members of a Board—and lastly, decisions involving such cases and involving the interpretation of our Code of Ethics so that all members would know the general principles upon which our organization was founded.

Now this has gotten considerably away from the original purpose of the committee, and apparently the way the committee has been divided this year, there are two channels of value to be developed. The original thought, as you will see from the vast correspondence and the charts sent to Miss Jones, was to bring about a study and aid Boards

in getting nearer to uniform fees or, at least, in correcting some of the mistakes other Boards had made, before they fell in the same pitfall.

1722 Realtor Daniel F. Sheehan -2-

Miss Jones has suggested that I forward some ideas. I am sorry I haven't much to offer other than what the files and this letter may contain, but I do suggest a follow-up of our work of last year to make sure the newer Boards, particularly, are off on the right foot. If they fail, you know as well as I, that the Boards won't mean much. If they take advantage of what we have sent them it should help in making a stronger and better Board. Our only difficulty was making sure that that which we sent to the President of each Board actually got to the Board as a whole, rather than merely to the individual to whom it was sent. I would suggest that the National Vice-Presidents, in their meetings with various Board leaders, mention the literature sent out last year, and see that basically it is adopted.

I know there are many other samples that could have been furnished which are better than the ones we sent out, but these were the ones close at hand that could be published without cost to the National, and they, at least, served as a guide.

If I can help you further, feel free to command me.

With personal regards, I am,

Fraternally yours,

Leon E. Todd

LET/B

1724 *Government's Exhibit 53*

1946 REPORT 1947

REAL ESTATE COMMISSION
of the
DISTRICT OF COLUMBIA

Containing List of Licensed
Real Estate Brokers
Real Estate Salesmen
Business Chance Brokers
Business Chance Salesmen
as of
December 31, 1947

District of Columbia
Real Estate Commission

Edward A. Dent, Assessor, D. C.
Chairman

Albert F. Adams
Attorney at Law

Carey Winston
Real Estate Broker

John A. Petty
Secretary

1725

TO THE PUBLIC:

This report of the work of the Real Estate Commission for the fiscal year ending June 30, 1947, together with a list of licenses as of December 31, 1947, is published in accordance with the provisions of law.

Edward A. Dent,
Chairman

December 31, 1947

1726 **Real Estate Commission of the District of Columbia**

1946 REPORT 1947

RECORD OF APPLICATIONS

RECEIVED JULY 1, 1946 TO JUNE 30, 1947

Real Estate

	Received	*Withdrawn*	*Denied*	*Granted*
Partnerships and corporations	317	2	2	313
Partners and officers	580	2	10	568
Individuals	1026	6	20	1000
Total brokers	1923	10	32	1881
Salesmen	2530	20	30	2480
Total Real Estate	4453	30	62	4361
Business Chance				
Partnerships and corporations	48	1	0	47
Partners and officers	58	1	1	56
Individuals	175	2	5	168
Total brokers	281	4	6	271
Salesmen	308	1	2	305
Total business chance	589	5	8	576
Total all applications	5042	35	70	4937

RECORD OF LICENSES

ISSUED JULY 1, 1946 TO JUNE 30, 1947

Real Estate

	Originals & Renewals	Duplicate	Exchange	Terminated	In Force 6/30/47
Partnerships and corporations	313	14	26	36	277
Partners and officers	568	2	106	23	545
Individuals	1000	13	251	48	952
Total brokers	1881	29	383	107	1774
Salesmen	2480	2	659	729	1751
Total Real Estate	4361	31	1042	836	3525

Business Chance

Partnerships and corporations	47	4	6	9	38
Partners and officers	56	0	28	2	54
Individuals	168	3	56	11	157
Total brokers	271	7	90	22	249
Salesmen	305	0	78	134	171
Total business chance	576	7	168	156	420
Total all licenses	4937	38	1210	992	3945

Duplicate licenses are issued for branch offices.
Exchange licenses are issued to cover changes in original licenses.
Terminated licenses cover death, withdrawal from business, etc.

RECORD OF LICENSES REVOKED

Clifford L. Crumbley, trading as Columbia Realty Company, 3429 14th Street, N. W., real estate broker

Francisco M. Bello, trading as F. M. Bello Realty Company, 1010 M Street, N. W., real estate broker

Ruby M. Polley, 5919 Georgia Avenue, N. W., real estate broker

Christine B. Bingham, trading as Northwestern Realty Company, 418 Third Street, N. W., real estate broker

Matthew P. Lucas, trading as Prosperity Acre Farms, 1006 N Street, N. W., real estate broker

Wallace A. Battle, Jr., 4 M Street, S. W., real estate broker

Clarence Berry, 215 Florida Avenue, N. W., real estate broker (Appeal pending in court)

RECORD OF EXAMINATIONS GIVEN

	Passed	Failed	Total
Real Estate Brokers	264	20	284
Real Estate Salesmen	651	218	869
Business Chance Brokers	60	2	62
Business Chance Salesmen	90	13	103
Total	1065	253	1318

COMPLAINTS AND INVESTIGATIONS

During the fiscal year ending June 30, 1947, the Commission received one hundred forty complaints. Of these six were withdrawn, forty-four dismissed, forty-two filed, and twenty-three settled. Thirteen complaints resulted in the revocation of seven licenses, and twelve complaints are pending.

Surety companies reported payment of $7,343.75 in settlement of claims against the bonds of four brokers and one salesman, and the sum of $10,881.72 was recovered for complainants by formal settlements.

Twenty cases of alleged operation without a license were investigated, and in eighteen cases the unlawful activities were immediately discontinued, one case was referred to the Corporation Counsel, and one case referred to the District Attorney. Sixteen applications for licenses were filed as a result of investigation. Investigations were made in connection with one thousand seven hundred eighty-four applicants for licenses and fifteen were withdrawn or denied as a result thereof.

EDWARD A. DENT, *Chairman*
CAREY WINSTON
ALBERT F. ADAMS
JOHN A. PETTY, *Secretary*

1728 In the Supreme Court of the United States

October Term, 1949

No. 428

Statement of Points to be Relied upon and Designation of Parts of the Record Necessary for Consideration Thereof—Filed Oct. 28, 1949

1729 1. Now comes the appellant in the above-entitled cause and for its statement of points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

2. Those parts of the record in this cause which were filed in this Court pursuant to the appellant's praecipe to the Clerk of the United States District Court for the District of Columbia are necessary for the consideration of the foregoing points and appellant designates those parts of said record designated in said praecipe and filed in this Court pursuant to said praecipe for printing by the Clerk of this Court except as follows:

(1) Of the Transcript of Proceedings in Criminal Action No. 950-47, omit those parts of the transcript designated in Schedule A attached hereto;

(2) Of the Government's exhibits omit those exhibits and parts of exhibits designated in Schedule B attached hereto;

1730 (3) Of the Transcript of Proceedings in the District Court (Judge Holtzoff) on June 27, 1949, omit those parts of the transcript designated in Schedule C attached hereto.

3. Of those parts of the record in this cause which were filed in this Court pursuant to the appellees' praecipe to the Clerk of the United States District Court for the District of Columbia the following are necessary for the consideration of the foregoing points and appellant designates the following parts of said record designated in said praecipe and filed in this Court pursuant to said praecipe for printing by the Clerk of this Court:

(1) Transcript of Proceedings in the District Court (Judge Holtzoff) on July 28, 1949;

(2) Order Modifying Order to Certify and Transmit Original Documents signed by Judge Goldsborough dated October 19, 1949; and

(3) Statement Concerning Designation of Record signed by Judge Goldsborough dated October 19, 1949.

PHILIP B. PERLMAN
Solicitor General

This 28th day of October, 1949.

1731 SCHEDULE A.

Parts of the Transcript of Proceedings in the trial of Criminal Action No. 950-47 to be *omitted*:

Pages 1-11, inclusive.
Page 18, line 13 to end of page.
Pages 19-39, inclusive.
Page 599, line 5 to end of page.
Pages 600-763, inclusive.

1732 SCHEDULE B

Exhibits and parts of exhibits in Criminal Action No. 950-47 to be omitted:

Exhibit 31—All except cover sheet (page 1) and page 6.
Exhibit 32—All except cover sheet and pages 1 and 5.
Exhibit 33—All except cover sheet (page 1) and pages 7 and 8.
Exhibit 34—All except cover sheet (page 1) and page 8.
Exhibit 35—All except cover sheet (page 7) and pages 11 and 12. (Page numbers referred to here are those in upper right-hand corner of sheet.)
Exhibit 36—All except cover sheet (page 10) and page 16. (Page numbers referred to here are those in upper right-hand corner of sheet.)
Exhibit 37—All except cover sheet (page 84) and page 93. (Page numbers referred to here are those in upper right-hand corner of sheet.)
Exhibit 38—All except cover sheet (page 61) and page 67. (Page numbers referred to here are those in upper right-hand corner of sheet.)
Exhibit 40—All except cover sheet (page 122) and page 129. (Page numbers referred to here are those in upper right-hand corner of sheet.)
Exhibit 42—All except cover sheet (page 62) and page 68. (Page numbers referred to here are those in upper right-hand corner of sheet.)
Exhibit 43—All except cover sheet (page 12) and page 18. (Page numbers referred to here are those in upper right-hand corner of sheet.)
Exhibit 46—All.
Exhibit 52—All.
Exhibit 53—All except pages 1, 2, 3 and 4. (Of these pages, only page 4 is numbered.)

1733 SCHEDULE C

Parts of the Transcript of Proceedings in the District Court (Judge Holtzoff) on June 27, 1949 to be omitted:

Page 8, lines 8 to bottom of page, inclusive.
Pages 9 to 58, inclusive.
Page 59, lines 1 to 12, inclusive.
Pages 76 to 100, inclusive.

1734 CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have, this 28th day of October, 1949, served the above STATEMENT OF

POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF, together with Schedules A, B and C attached thereto, by mailing a copy, postage prepaid, to the attorneys for each of the appellees as follows:

Roger J. Whiteford and John J. Wilson
815-15th Street, N. W.
Washington, D. C.
Attorneys for the appellees
National Association of Real
Estate Boards and Herbert U. Nelson

William E. Leahy and William J. Hughes
821-15th Street, N. W.
Washington, D. C.
Attorneys for the appellee Washington
Real Estate Board and individual appellees
other than Herbert U. Nelson and J. Hawley Smith

Walter M. Bastian and A. K. Shipe, Jr.
National Press Building
Washington, D. C.
Attorneys for appellee J. Hawley Smith

VICTOR H. KRAMER
Victor H. Kramer
Attorney for the United States

1735 (File Endorsement Omitted)

1737 In the Supreme Court of the United States

October Term, 1949

No. 428

Counterdesignation of Additional Parts of the Record to be Printed—Filed Nov. 8, 1949

Pursuant to this Honorable Court's Rule 13, the Appellees hereby designate the following parts of the record to be printed in addition to those parts designated by Appellant: (page numbers are those of the record as filed in this Honorable Court):

Pages 1 & 2,
Page 4, first three lines only,
Page 28, last five lines only,
Page 29.

Page 628, lines 10 thru 22, with the symbol [MR. KRAMER] before it (or in the alternative we designate the name "MR. KRAMER" where it appears the second time on page 621),
Page 631, lines 20 to end of page,
Page 632, first three lines,
Page 723, lines seven thru 23,
Pages 774 thru 787,
Page 872,
Page 874,
Page 1021, last seven lines,
Pages 1022 thru 1023,
1738 Page 1196, line four to end of page,
Page 1197,
Pages 1226 thru 1244,
Pages 1327 thru 1329,
Pages 1347 thru 1352,
Page 1381,
Page 1402, and Page 1422,
Page 1424,
Page 1426,
Pages 1470 thru 1473.

JOHN J. WILSON,
John J. Wilson,
815 15th Street, N. W.,
Washington, D. C.
Attorney for Appellees,
National Association of Real Estate
Boards and Herbert U. Nelson.

WHITEFORD, HART, CARMODY & WILSON,
Washington, D. C.,
Of Counsel.

WILLIAM E. LEAHY,
William E. Leahy,

WILLIAM J. HUGHES, JR.,
William J. Hughes, Jr.,
821 15th Street, N. W.,
Washington, D. C.,
Attorneys for Appellees,
Washington Real Estate Board and all
individual Appellees except Herbert
U. Nelson and J. Hawley Smith.

WALTER M. BASTIAN,
Walter M. Bastian,

A. K. SHIPE,
A. K. Shipe,
National Press Building,
Washington, D. C.,
Attorneys for Appellee.
J. Hawley Smith.

1739 CERTIFICATE OF SERVICE

I certify that on this 8th day of November, 1949, I mailed a copy of the above, postage prepaid, addressed to Philip B. Perlman, Esq., Solicitor General, Department of Justice, Washington, D. C.

JOHN J. WILSON,
John J. Wilson,
Attorney for Appellees,
National Association of Real Estate
Boards and Herbert U. Nelson.

1740 (File Endorsement Omitted)

1741 Supreme Court of the United States

No. 428. ..., October Term, 1949

Order Noting Probable Jurisdiction—November 21, 1949.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration or decision of this question.

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No. 458

In the Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In the United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3472-47

UNITED STATES OF AMERICA, PLAINTIFF

VS.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on July 29, 1949. A petition for appeal is presented to the district court herewith, to wit, on September 23, 1949.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U. S. 427;
United States v. *Yellow Cab Company*, 332 U. S. 218;
United States v. *Columbia Steel Co.*, 334 U. S. 495.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 3, 4), commonly known as the Sherman Act, provides in part as follows:

> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such Territory or Territories and any State or States or of the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. * * *
>
> SEC. 4. The several district courts in the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

THE ISSUES AND THE RULING BELOW

This is an equity suit brought by the United States in the United States District Court for the District of Columbia against the Washington Real

Estate Board, an incorporated trade association of real estate brokers in Washington, D. C.; the members of this Board; the National Association of Real Estate Boards, a nationwide incorporated trade association of which both the Washington Real Estate Board and its members are members; and Herbert U. Nelson, executive vice-president of the National Association of Real Estate Boards. The complaint charges that the defendants combined and conspired to fix the commission rates to be charged by members of the Washington Board when acting as agents in the sale, exchange, lease and management of real property in the District of Columbia, in violation of Section 3 of the Sherman Act.

The major facts established at the trial of the cause, as they are set forth in the opinion of the district court and its findings of fact, may be summarized as follows:

Members of the Washington Board, some of whom are incorporated, perform a substantial portion of the total business done in the District of Columbia in real estate brokerage transactions. The Washington Board has for many years prescribed fixed rates of commission to be paid to real estate brokers on sales of real property. All applicants for membership in the Board are required to fill out and sign an application form which states that the applicant agrees to subscribe to the Constitution and By-Laws, Code of Ethics and other rules of the Board. Section 3 of the Code of Ethics provides: "Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates." The schedules of commission have been construed by the members

as non-mandatory in character and as setting forth a basis upon which to estimate fair compensation for services rendered. In actual practice the published rates of commission are used in the great majority of transactions although in many cases members of the Washington Board depart from the schedule.

The district court held that the agreement fixing the commission rates to be charged by real estate brokers for negotiating sales of real estate in the District of Columbia did not, on the facts established by the evidence, violate Section 3 of the Sherman Act. The court concluded that the rule that a price-fixing agreement imposes restraints which are *per se* unreasonable and illegal under the Act does not apply to an agreement fixing charges for "personal services". The court found support for this distinction between price fixing as to commodities and price fixing as to "personal services" in the first sentence of Section 6 of the Clayton Act, which reads: "The labor of a human being is not a commodity or article of commerce." The court said that a real estate board may be likened to a labor union of real estate brokers and that the principle is the same when those who receive commissions in compensation for their services combine to fix their commission charges and when those who toil for wages combine upon the minimum wage rates which they will accept.

The court said that there was no showing that the commission rates which were fixed were unreasonable in themselves or resulted in a substantial diminution of competition. The court therefore found it unnecessary to pass upon the question whether a

combination of this kind might, under some circumstances, come within the prohibitions of the Act.

The court, after filing findings of fact and conclusions of law, entered judgment for the defendants.

THE QUESTIONS ARE SUBSTANTIAL

The appeal presents the important question of whether a combination fixing rates of commission for real estate brokerage transactions comes within the prohibitions of the Sherman Act. The appeal presents the further important question of whether such a combination is subject to the rule that the restraints imposed by price-fixing combinations are *per se* unreasonable and unlawful under Sections 1 and 3 of the Act.

It is settled that exchange of services for pay, as well as dealings in commodities, constitute trade or commerce within the meaning of the Act. It was held at an early date that the Act applies to combinations which restrain competition in providing the service of transportation. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505. Decisions in recent years have upheld the application of the Act to combinations which restrain competition in providing cleaning and dyeing services (*Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 431) and medical and hospital services (*American Medical Association* v. *United States*, 317 U. S. 519). The restraints which the Act prohibits cover both those on the marketing of services and those on the marketing of goods. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, 495, 498. And where trade or commerce in the District of Columbia is concerned, the prohibitions of Section 3 extend to

any "occupation, employment, or business" carried on for purposes of gain (with the possible exceptions of the "liberal arts" or "learned professions"). *Atlantic Cleaners & Dyers* case, *supra*, at pp. 436-437.

Price-fixing agreements among those engaged in a service industry or trade are within the rule that price-fixing agreements are *per se* in unreasonable restraint of trade and unlawful.[1] There is sound basis for these decisions since the reasons for the *per se* rule apply with full force where the price for services is fixed by agreement. "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221), whether the prices involved are those for goods or services. Congress has not left it to the courts to determine "whether or not particular price-fixing schemes are wise or unwise, healthy or destructive"; with respect to such agreements, it has established "one uniform rule applicable to all industries alike." *Id.*, pp. 221, 222.

The district court appears to have held that defendants' combination involved fixing prices for "personal services," and that such a combination is exempted from the prohibitions of the Sherman Act by what the court termed "the pertinent public policy in respect to personal services" to be found in Section 6 of the Clayton Act. But Section 6 relates

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[1] *Trans-Missouri Freight Assn.* and *Joint Traffic Assn.* cases, *supra*, as interpreted in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 398; *Atlantic Cleaners & Dyers* case, *supra*; *United States* v. *Maryland & Virginia Milk Producers Assn., Inc.* (C.A. D.C.), C.C.H. Tr. Reg. Rep. 48-51, par. 62,452, (petition for certiorari pending, No. 195, this Term.)

exclusively to "labor, agricultural, or horticultural organizations" and their members. Real estate brokers are not such an organization or members thereof. They are independent entrepreneurs, employers rather than employees. They occupy offices and engage in advertising. They commonly employ varying numbers of salesmen, secretaries and others. Their brokerage services involve no employer-employee relationship, but are rendered pursuant to a series of independent contracts, each with a new customer. Activities of this character lie wholly outside the scope of Sections 6 and 20 of the Clayton Act, as well as outside of related provisions of the Norris-LaGuardia Act. *Columbia River Packers Association, Inc.* v. *Hinton*, 315 U. S. 143, 145-147; *American Medical Association* case, *supra*, at pp. 535-536. See also *American Medical Association* v. *United States*, 130 F. (2d) 233, 243 (C.A. D.C.), affirmed, 317 U. S. 519.

We believe that the appeal presents questions of substance as to error by the district court in its interpretation of the Sherman Act and as to conflict between its decision and applicable decisions of this Court, and we believe that the questions are of public importance.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 23, 1949.

OPINION

THE COURT (HOLTZOFF, J.): This is a civil action by the United States for an injunction to restrain the defendants from continuing alleged violations of the Sherman Antitrust Act. The suit is brought under Section 3 of the Act, U. S. Code Title 15, Section 3. The pertinent portions of this section are as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the District of Columbia is declared illegal."

The defendants in this case are, first, the Washington Real Estate Board, which is a corporation having its place of business in the District of Columbia. Other defendants are members of the Board, who are sued as a class, a few of the members being named as representatives of the class. Finally, there is also joined as a defendant the National Association of Real Estate Boards, which is a corporation having its principal place of business in Chicago, Illinois. The National Association comprises among its members various local real estate boards, and the Washington Real Estate Board is one of such members.

The Government contends that the defendants have combined to fix real estate brokerage commissions to be charged by real estate brokers in the District of Columbia. The Government urges that this activity constitutes a violation of the Sherman Antitrust Act.

In brief, the evidence shows that the membership of the Washington Board embraces about 250 real estate brokers out of a total number of about 2,000 brokers operating in the District of Columbia. The Washington Board has for many years prescribed fixed rates of commissions to be paid to brokers on sales of real property. The rates are published and

are readily available to the public. All members of the Board are urged to use these rates. Actually, both members and many nonmembers employ them. There is nothing clandestine or surreptitious about this activity of the Washington Board.

In 1943 the rates were changed, resulting in higher charges in many instances and in lower commissions in other situations. In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board. For example, smaller commissions than the standard rate have been charged in connection with large developments comprising a great many homes.

The National Association has been joined as a defendant on the theory that it has encouraged and has incited the Washington Board to fix and prescribe rates of commissions to be charged by the members of the latter. No evidence has been introduced tending to show that the standard rate of commissioners prescribed by the Washington Board is unreasonable or excessive or that this activity unduly or unreasonably restrains competition as between brokers or adversely affects the sales of real property. On the contrary, there is evidence in the record to the effect that before the Board attempted to fix standard commission rates there was chaos and confusion, resulting in occasional overcharges on the part of the less scrupulous members of the craft, and that one of the purposes of the Board was to eliminate this undesirable condition. The Government contends, however, that irrespective of whether it is reasonable or laudable, the fixing of commission rates is illegal *per se* and constitutes a violation of the Sherman Act.

Ever since the decisions of the Supreme Court in *Standard Oil Company* vs. *United States*, 221 U. S. 1, and *United States* vs. *American Tobacco Company*, 221 U. S. 6, it has been consistently held

that the Sherman Act does not ban all restraints of trade but proscribes only those that are unreasonable. In the two cases to which I have referred, the Court held that the Sherman Act must be construed in the light of reason and that the rule of reason must prevail.

In recent years it has been held by the Supreme Court that price-fixing is *per se* an unreasonable restraint of trade and, therefore, illegal in and of itself, even under the so-called rule of reason. *United States* vs. *Socony-Vacuum Oil Company*, 310 U. S. 150, and *United States* vs. *Trenton Potteries Company*, 273 U. S. 392. The cases in which this doctrine had been formulated and enunciated, however, involved prices of commodities and of articles of trade. This principle has never been invoked, so far, at any rate, in connection with charges for personal service. There is a vast distinction in principle between fixing the prices of commodities or articles, on the one hand, and prescribing charges for personal services, on the other hand. A statement of the pertinent public policy in respect to personal services is to be found in the Clayton Act, U. S. Code, Title 15, Section 17. The statement is as follows:

> "The labor of a human being is not a commodity or article of commerce."

This is a very important, basic pronouncement. The term "labor" as used in the Clayton Act is not limited to the work of manual laborers or of mechanics. It comprises intellectual labor as well. Neither is the term restricted to the work of the poor or the needy. Thus there are labor unions of mechanics, of clerks, of teachers, and of airplane pilots. Many other similar instances might be adduced. All of those organizations fix wages or salaries to be charged by their members. Such activities have never been held to form violations of the Sherman Act *per se*.

A real estate board may in a sense be likened to a labor union of real estate brokers. Admittedly there is no case in the Federal courts that has applied to personal services the rule that the fixing of prices of commodities or articles is *per se* an unreasonable restraint of trade. To contract for one's personal services is a fundamental right of every man. For men to combine to regulate the compensation to be charged by them for their own services is also entirely legal. While this right has been generally recognized in respect to persons who toil for wages or salaries, no reason appears discernible why it is not equally applicable in principle to those persons who work for commissions. The instant case appears to be the first occasion in the history of the enforcement of the Sherman Act that the Government has challenged this right.

It is a matter of common knowledge that rates of commissions for brokers' services of various kinds have been openly prescribed by numerous organizations of brokers for a great many years. This activity has never been condemned as violative of the Sherman Act, and the Government has never so contended prior to this case. On the contrary, the result of stabilization of charges and the consequent uniformity has generally been considered as being in the public interest. No reason is perceived for changing these principles as they have been heretofore understood.

The Court is of the opinion that for persons engaged in a particular occupation to fix or prescribe a standard charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act. A different problem might be presented if the rates fixed were shown to be unreasonable or oppressive in themselves or if it appeared that they resulted in a substantial diminution of competition or otherwise created an unreasonable restraint of trade or com-

merce. There is no such showing or even contention in this case.

Judgment for the defendants.

Counsel will submit proposed findings of fact and conclusions of law.

I certify that the foregoing is the official transcript of the Opinion of the Court in United States vs. National Association of Real Estate Boards et al., Civil Action No. 3472-47, on Tuesday, June 28, 1949.

(S.) FRANCIS J. ATTIG,
Official Reporter.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
The activities of the Washington Board	6
The participation of the National Association and Herbert U. Nelson in the activities of the Washington Board	13
Specification of errors to be urged	22
Summary of argument	24
Argument	27
I. Appellees have been parties to a combination fixing real estate brokerage commission rates in the District of Columbia	27
A. The Washington Board has established commission rates to which its members generally adhere	27
B. The National Association and Nelson have aided and encouraged the Washington Board to fix commission rates	37
II. The combination fixing real estate brokerage commission rates in the District of Columbia constitutes *per se* a violation of Section 3 of the Sherman Act	43
A. The *per se* rule applied to price-fixing has equal application to rate-fixing by real estate brokers	44
B. The rate-fixing activities of real estate brokers are not exempted from the Sherman Act by Section 6 of the Clayton Act	57
III. The judgment of acquittal in the criminal action against the Washington Board and National Association is not res judicata as to this action	62
Conclusion	73

CITATIONS

Cases:

Alden-Rochelle, Inc. v. *American Society of Composers, Authors and Publishers*, 80 F. Supp. 888 45

American Column & Lumber Co. v. *United States*, 257 U. S. 377 ..... 28, 32, 33

American Medical Association v. *United States*, 130 F. 2d 233, affirmed, 317 U. S. 519 ..... 26, 60

American Medical Association v. *United States*, 317 U. S. 519 ..... 25, 44, 59

Cases—Continued

	Page
Anderson v. *United States*, 171 U. S. 604	47
Angel v. *Bullington*, 330 U. S. 183	69
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	45
Associated Press v. *United States*, 326 U. S. 1	38–39, 44
Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U. S. 427	25, 44, 45, 47, 48
Bailey v. *Association of Master Plumbers*, 103 Tenn. 99, 52 S. W. 853	45
Campbell v. *Motion Picture Machine Operators' Union*, 151 Minn. 220, 186 N. W. 781	45
Coffey v. *United States*, 116 U. S. 436	63
Columbia River Packers Association, Inc. v. *Hinton*, 315 U. S. 143	26, 58
Curley v. *United States*, 160 F. 2d 229, certiorari denied, 331 U. S. 837	67
Eastern States Lumber Ass'n v. *United States*, 234 U. S. 600	32
Employing Printers Club v. *Dr. Blosser Co.*, 122 Ga. 509, 50 S. E. 353	45
Federal Trade Commission v. *Pacific Paper Association*, 273 U. S. 52	32
Galloway v. *United States*, 319 U. S. 372	70
Gardella v. *Chandler*, 172 F. 2d 402	45
Gatzow v. *Buening*, 106 Wisc. 1, 81 N. W. 1003	45
Graf v. *Master Horse-Shoers Protective Assn.*, 1 Ohio N. P. (N. S.) 423	45
Hecht Co. v. *Whiteford*, 137 F. 2d 929, certiorari denied, 320 U. S. 795	54
Helvering v. *Mitchell*, 303 U. S. 391	63, 64, 66, 72
Hopkins v. *United States*, 171 U. S. 578	47
Interstate Circuit v. *United States*, 306 U. S. 208	28
Johnson Co. v. *Wharton*, 152 U. S. 252	65
Manderville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219	47
Milk Wagon Drivers' Union v. *Lake Valley Co.*, 311 U. S. 91	59
More v. *Bennett*, 140 Ill. 69, 29 N. E. 888	45
Murphy v. *United States*, 272 U. S. 630	63
Nash v. *United States*, 229 U. S. 373	33
National Association of Real Estate Boards v. *United States*, 176 F. 2d 631	4
New Negro Alliance v. *Grocery Co.*, 303 U. S. 552	59
Ring v. *Spina*, 84 F. Supp. 403	49
Ring v. *Spina*, 148 F. 2d 647	45, 47, 49, 60, 61
The Schooner Nymph, 18 Fed. Cas. 506	46
Slocum v. *New York Life Insurance Company*, 228 U. S. 364	70
Stafford v. *Wallace*, 258 U. S. 495	47
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20	66
State v. *Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395	45
State v. *Wilson*, 73 Kans. 343, 84 Pac. 737	45
Stone v. *United States*, 167 U. S. 178	62, 63

Cases—Continued

	Page
Fatcher v. *United States*, 107 F. 2d 316	70
United Shoe Machinery Co. v. *United States*, 258 U. S. 451	33
United States v. *American Medical Association*, 110 F. 2d 703, certiorari denied, 310 U. S. 644	45
United States v. *American Linseed Oil Co.*, 262 U. S. 371	28
United States v. *Associated Press*, 52 F. Supp. 362, affirmed, 326 U. S. 1	53
United States v *Joint Traffic Association*, 171 U. S. 505	44, 47
United States v. *Line Material Co.*, 333 U. S. 287	40, 47, 53, 55
United States v. *Maryland & Virginia Milk Producers Association, Inc.*, C. A. D. C., decided June 17, 1949, C. C. H. Tr. Reg. Rep. 48-51, par. 62.452, certiorari denied, 338 U. S. 831	47
United States v. *Masonite Corp.*, 316 U. S. 265	28, 40
United States v. *National Assn. of Real Estate Boards, et al.*, 80 F. Supp. 350	4
United States v. *Paramount Pictures, Inc.*, 334 U. S. 131	28, 45, 47
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	33, 47, 50, 55
United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533	47, 53, 54
United States v. *Sugar Institute*, 15 F. Supp. 817, affirmed, 297 U. S. 553	50
United States v. *Trans-Missouri Freight Association*, 166 U. S. 290	44, 46, 51
United States v. *Trenton Potteries*, 273 U. S. 392	25, 33, 47, 50
United States v. *U. S. Gypsum Co.*, 51 F. Supp. 613	65, 69
United States v. *United States Gypsum Company*, 333 U. S. 364	41
United States v. *Wallace & Tiernan Co.*, 336 U. S. 793	65
United States v. *Warner Bros. Pictures, Inc.*, 13 F. Supp. 614, affirmed, 298 U. S. 643	65
United States v. *Waters*, 175 F. 2d 340	66
United States v. *Women's Sportswear Manufacturers Association*, 336 U. S. 460	60
Wickard v. *Filburn*, 317 U. S. 111	47

Statutes:

Act of August 25, 1937, 50 Stat. 787	56
Sec. 4	56
Sec. 16	56
Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. Sec. 17, 29 U. S. C. 52:	
Sec. 6	26, 57, 58
Sec. 20	58, 59
Norris-LaGuardia Act, 47 Stat. 70, 73, 29 U. S. C. 101, 113:	
Sec. 13	58, 59

Statutes—Continued Page

Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 1 *et seq:*
Sec. 1 ..... 44, 47, 49
Sec. 3 ..... 2, 44, 49
Sec. 4 2
18 U. S. C. 3731 66

Miscellaneous:
Federal Rules of Civil Procedure:
Rule 30 65
Rule 31 65
Rule 33 65
Rule 36 65
Rule 43b 65
Federal Rules of Criminal Procedure:
Rule 12 68
Rule 29 ..... 26, 67, 68, 69, 70
Freeman, *Judgments* (5th Ed. 1925), Sec. 742 70
McBaine, *Trial Practice: Directed Verdicts; Federal Rules*, 31 Calif. L. R. 454 70
Webster's New International Dictionary (2d Ed.) 14

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 428

THE UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the District of Columbia (R. 437) is reported in 84 F. Supp. 802.

JURISDICTION

The final judgment of the District Court was entered on July 29, 1949 (R. 436). The petition for appeal was filed and allowed on September 23, 1949 (R. 440–441). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989. Probable jurisdiction was noted on November 21, 1949 (R. 629).

QUESTIONS PRESENTED

The principal question presented by this appeal is whether the established principle that price-fixing agreements are illegal *per se* under the Sherman Act is inapplicable to a combination to fix the rates of real estate brokerage commissions in the District of Columbia, simply because (1) personal services are involved in brokerage transactions, and (2) no penalties are imposed to compel adherence to the rates fixed.

In addition, the following question is raised by appellees as a ground for supporting the decision below: Whether a judgment of acquittal in a criminal action under the Sherman Act is res judicata in a civil action founded upon the same allegations of fact.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, * * * is hereby declared illegal. [15 U. S. C. 3.]
>
> SEC. 4. [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in

their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT

This is a civil action brought by the United States on August 27, 1947, in the United States District Court for the District of Columbia against (a) Washington Real Estate Board (hereinafter referred to as "the Washington Board"), an incorporated association of real estate brokers in Washington, D. C. (Fng. 1, R. 433), (b) fifteen of its members individually and as representatives of a class consisting of all members of the Washington Board, (c) National Association of Real Estate Boards (hereinafter referred to as "the National Association"), a nation-wide incorporated trade association of which both the Washington Board and its active members are members (Fng. 18, R. 434), and (d) Herbert U. Nelson, its executive vice-president (Fng. 19, R. 434).

The complaint charged appellees with engaging in a combination and conspiracy in violation of Section 3 of the Sherman Act to fix the commission rates to be charged by the members of the Washington Board for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia (R. 367). The complaint sought a declaration that the combination to fix rates was illegal,

annulment of various provisions in the constitutions and by-laws, codes of ethics, and other rules of the appellee associations prescribing adherence to rates or schedules of commissions, an injunction against continuation of the price-fixing practices, and such other relief as the case might require (R. 372).

On the same day that the complaint in this case was filed, an indictment was returned against the Washington Board and the National Association (Fng. 21, R. 435), charging the defendants criminally with having engaged in substantially the same combination and conspiracy alleged in this action (Fng. 22, R. 435). In May 1948, the criminal case came on for trial. At the conclusion of the Government's case, on June 4, 1948, the district court (Judge Curran) granted the defendants' motion for a judgment of acquittal (Fng. 24, R. 435): *United States* v. *National Association of Real Estate Boards, et al.*, 80 F. Supp. 350 (D. D. C.).

On July 5, 1948, appellees filed motions for summary judgment in this action contending that the judgment of acquittal in the criminal case is res judicata here (Fngs. 25, 26, R. 435). The district court (Judge Goldsborough) overruled these motions (Fng. 26, R. 435), and a petition to the Court of Appeals for allowance of a special appeal from that ruling was dismissed for lack of jurisdiction. *National Association of Real*

Estate Boards v. *United States*, 176 F. 2d 631 (C. A. D. C.).

At the suggestion of the district court (Judge Holtzoff), the parties entered into a stipulation that the civil case would be tried on the record made in the trial of the criminal case but the Government reserved the right to offer any exhibits which had been excluded in the criminal case (R. 330–333, 428).[1] In the ensuing trial the Government offered 16 of these exhibits and all were received in evidence (R. 335–336).[1a] No evidence was offered by appellees (R. 336).

On June 28, 1949, the district court rendered an opinion concluding that the agreement upon the rates of brokerage commissions to be charged by members of the Washington Board is not a violation *per se* of Section 3 of the Sherman Act and that there had been no showing that such agreement effected an unreasonable restraint of trade (R. 440). The court on July 29, 1949, filed its findings of fact and conclusions of law, and entered a judgment in favor of the appellees on the merits (R. 433–436).[2]

[1] In the criminal trial the Government offered 47 exhibits. Eight witnesses testified, all but one of whom were officers, members or employees of the Washington Board or National Association.

[1a] Gov. Ex. 49, R. 618, offered but excluded in the criminal case (R. 190–192), was not re-offered during the trial of this case, and was printed through inadvertence.

[2] The defense of res judicata was again overruled (Concl. 4, R. 436).

THE ACTIVITIES OF THE WASHINGTON BOARD

The 250 members of appellee Washington Board handle a substantial portion of the real estate brokerage business in the District of Columbia (Fng. 2, R. 433). They act as agents for the sale, exchange, lease and management of real estate for a commission or fee (Compl., par. 8, R. 366; Ans., Wash. Bd., par. 8, R. 384–385). Although some of the broker-members of the Board are corporations (Fng. 3, R. 433) or employ salesmen (R. 250–251, 263, 273, 280), the court below characterized their business as "personal services in the sale, lease and exchange of real estate" (Fng. 5, R. 433).

Article 2 of the "Constitution and By-laws" of the Washington Board states as one of the objects of the Board "To assure to the public the services of responsible and trustworthy agents and brokers, acting on definite and uniform standards of contracts and charges, with the view of protecting the interests of all parties" (Gov. Ex. 3, R. 462). The Washington Board openly adopts and publishes, and for a period of years has adopted and published, schedules of "standard" commissions for the services performed by its members in the sale, exchange, lease, and management of real estate in the District of Colum-

bia.[3] As the court below put it, "The Washington Board has for many years prescribed fixed rates of commissions to be paid to brokers" (Op. R. 438; see Fng. 6, R. 433). The Schedule of Commissions adopted by the Board is a detailed rate book which lists charges for every conceivable service furnished by a real estate agent (Gov. Ex. 25, R. 569–574). The Schedule occupies six pages of the printed record and contains 46 separate subsections.[4]

The method of the Washington Board in arriving at the rates which it prescribed is reflected in the minutes of a special meeting of the members of the Washington Board held February 16, 1943, to consider the recommendations of a committee with respect to a proposed revision of the rates applicable to sales of real estate.[5] The

[3] Fng. 6, R. 433; Fng. 8, R. 433; Compl., pars. 17–21, 23–27, R. 368–371; Ans., Wash. Bd. pars. 17–21, 23–27, R. 386–390. The standard form of sales contract prepared by the Washington Board for optional use by its members (Fng. 17, R. 434) contains the following provision with respect to rates of commission (Gov. Ex. 26 (par. 16) R. 575–576): "The seller agrees to pay to * * * Agent, the regular rate of commission fixed by the Washington Real Estate Board * * *."

[4] The Schedule is divided into seven sections respectively entitled, "Sales", "Exchanges", "Leases—Business Property", "Leases—Residential Property", "Property Management", "Mortgage Loans" and "Special Services."

[5] The then existing commission rates were as follows (Ans., Wash. Bd., par. 20, R. 387–388):

> "Five per cent on all sales in Cleveland Park, Saul's Addition, Chevy Chase, Bradley Hills, Brightwood, Takoma Park, Brookland and similar vicinities.

committee reported in part as follows (Gov. Ex. 20, R. 553–554):

> "Your committee submits that conditions have changed to such an extent since 1917 that the lower commission rate charged on property within the old 'city proper' area is unfair and inequitable, causes embarrassment and confusion among owners and brokers, and has in many cases caused bad feeling among owners, who, while not objecting to a 5% commission rate, see no reason why they should be charged more than their friend whose property might be a block or less away."
>
> * * * * *
>
> "Lastly, we submit there is no legitimate reason why the commission rates in Washington, D. C., which has been well described as the Capital of the World, should not be comparable to those rates charged by other large cities, the rates of which are shown below:

Philadelphia	5% straight—no ceiling.
St. Paul	5% straight—no ceiling.
Syracuse, N. Y.	5% straight—8% beyond 7 miles from center of city.
Chicago	5% to $100,000.—3% above.
Kansas City	5% to $100,000.—3% above.
Columbus, Ohio	5% to $100,000.—4% above.

Five per cent on sales of $5,000 and less, in City area, with 3% additional charged on the excess above $5,000.

Minimum commission for any sale, $50.00."

The proposed rates included a commission of 5% on sales up to $50,000, 3% on the excess above $50,000, and a minimum sales commission of $100, irrespective of whether the property is located in the "city" or "suburban" area.

> "It will be noted that the suggested change eliminates the theoretical boundary line but at the same time *fixes* the District of Columbia rate a great deal more favorable to the property owner than in any city above named." [Emphasis added.]

The minutes then recount the discussion by the Board members of the committee report (*id.*, R. 554):

> The subject was generally discussed as well as the proposed $50,000 ceiling. An amendment was offered by Mr. Breuninger to the motion of Mr. McConihe for the adoption of the report providing for a $25,000 ceiling but this was rejected by a majority vote.
>
> The motion providing for a 4% overall rate died for want of a second. During the discussion, it was suggested that the Board should make a study of services performed by members for which they are not now being compensated. The motion offered by Mr. McConihe and seconded by Mr. Hohenstein providing for adoption of the report of the Brokers Committee was then unanimously approved.

The new schedule adopted resulted in higher charges in many instances and lower charges in others (Fng. 10, R. 433–434).

In setting forth its schedule of commissions, the Washington Board has not merely declared what had previously been established by custom.

As counsel for the Washington Board stated in the court below, before the adoption of the schedule the "business of selling and exchanging and leasing and managing real estate was a matter of every real estate man charging about what he could get" (R. 24). And the court found that "Before the board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive charges, and one of the purposes of the Board was to eliminate this undesirable condition" (Fng. 14, R. 434).[6]

The duty of the members to adhere to the rates fixed by the Board is reflected in Section 3 of the Board's "Code of Ethics" which explicitly provides that "Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates" (Fng. 15, R. 434). Not only must an applicant for membership in the Washington Board sign an application form which states thereon that he

[6] Although the court was clearly right in concluding that the Washington Board's purpose was to stabilize commissions, we have assigned this finding as error because the record is bare of any evidence indicating the condition of the brokerage industry in the District of Columbia—chaotic or otherwise—prior to the time when the Board first fixed rates. The only evidence of chaos and confusion relates to the period when, prior to the 1943 revision of rates, the Washington Board had rate zones (R. 112, 115, 269, 284). Since, however, it is the Government's contention that rate fixing is illegal *per se*, the conditions present when a free market for brokerage services existed would not, in our view, be material in any event.

agrees to subscribe to the Code of Ethics (Fng. 9, R. 433), but as the Washington Board expressly admitted in its answer (par. 18, R. 386–387), the members agree as a condition of membership that they will abide by the above provision.

With respect to the practices of the members, the court stated: "In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board" (Op. R. 438; and see Fngs. 11, 12, R. 434).

Notwithstanding the above findings regarding agreement and adherence, the court concluded that the rate schedules of the Board have been treated by the members as "non-mandatory" in character. This conclusion apparently reflects the court's view that there have been no penalties imposed for violation of the prescribed rates (Fng. 16, R. 434). During the hearing on the adoption of findings, the following colloquy ensued between the court and Government counsel as to the meaning of "non-mandatory" (R. 350–351):

> Mr. KRAMER. If the Court please, if the words "non-mandatory in character" were changed to read "the rates should be adhered to," I would follow the finding, but this can be construed in almost any direction counsel wishes to construe it.
>
> The COURT. There is nothing ambiguous about the words "non-mandatory."

> Mr. KRAMER. Of course, if you come to an interpretation——
>
> The COURT (interposing). Not at all, because there are some associations of brokers which would penalize a broker for not—I am going to leave it the way it is. I think it is just a choice of words.

Although sanctions for departure from rate schedules have not been invoked, Article 13 of the Washington Board's by-laws (Gov. Ex. 3, R. 471), which is entitled "Membership Forfeiture", includes the provision that

> The Board of Directors, upon complaint or on its own initiative, by majority vote may censure, suspend or expel any member for conduct which in its opinion is *subversive to the purpose and scope* of this Board, provided, however, that any such member shall be given an opportunity to appear before the Board of Directors to answer the complaint. [Emphasis supplied.]

As has been noted, Article 2 of the Constitution and By-Laws includes as one of the "objects" of the Washington Board "uniform standards of contracts and charges" (Gov. Ex. 3, R. 462). And quite apart from the sanctions of the Washington Board, its members and the Board itself are subject to the sanctions of the National Association, discussed *infra*, pp. 14–15.

The Executive Secretary and the two members of the Washington Board who testified in this

case uniformly asserted that the members of the Board are not bound by the published rates (R. 123–124, 138, 264, 292), and that no penalty or sanction has been imposed for departures (R. 124, 139, 263, 293). But the Executive Secretary also testified that in the usual case he advised members who inquired that it was "unethical and improper" to cut rates (R. 129). The Secretary was unable to recall any letter written by him stating that the rules permitted cutting commission rates (R. 129). One Board member (Beitzell) testified that the Board's action in 1943 in revising its commission rates was important to his business (R. 255–256) because he "followed the general pattern of the charges by all brokers" (R. 256). And he admitted that the Board's schedule was the "general rule" for the members and that he "attempted to follow the general rule" although he "made exceptions in the rules, many times" (R. 271).

THE PARTICIPATION OF THE NATIONAL ASSOCIATION AND HERBERT U. NELSON IN THE ACTIVITIES OF THE WASHINGTON BOARD

Appellee National Association is an incorporated trade association including as members some 42,000 real estate brokers and persons affiliated with the real estate business in the United States and some 1,040 local real estate associations (R. 142). Appellee Herbert U. Nelson is the executive vice-president of the National Asso-

ciation (Fng. 19, R. 434). Every active member[7] of the Washington Board, and the Board itself, are members of the National Association (Fng. 18, R. 434; see also R. 35, 83–84).

Article 9 of the National Association's "Code of Ethics" provides (Gov. Ex. 6, R. 483):

> The schedules of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and *should be observed by every Realtor.*[8] [Emphasis supplied.]

The National Association has adopted rules and sanctions relating to maintenance of the "Code." Thus, as a condition of membership in the National Association, the Washington Board and its members (and other local boards and their members) agree to abide by the "Code of Ethics" promulgated by the National Association (Ans., Nat'l Assn., par. 16, R. 376). And each member board is explicitly required by the National Association's by-laws to adopt the code "as a part of its rules and regulations for violation of which

[7] There are also "associate" members consisting of salesmen and other employees of active members (Gov. Ex. 3, R. 463).

[8] The word, "Realtor" is defined by the National Association as a "person engaged in the real estate business who is a Board Member or an Individual Member of the National Association of Real Estate Boards, is subject to its rules and regulations, observes its standards of conduct, and is entitled to its benefits" (Gov. Ex. 7; R. 488). See also Webster's New International Dictionary (2nd ed.), p. 2073.

disciplinary action may be taken" (Article III, Section 1, Gov. Ex. 7, R. 502).[9] Although the sanction has never been invoked (R. 225) any member board which "shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its constituent members" may be expelled from the National Association (Article III, Section 2, Gov. Ex. 7, R. 502–503).

In addition to its by-laws and code of ethics above described, the National Association has taken an active part in the formulation of standards of compensation through the activities of its various committees on rates, rules and customs. From time to time these committees made studies of brokerage commission rates prevailing over the United States and prepared reports which were distributed to member real estate boards (Ans., Nat'l Assn., par. 14, R. 375). The National Association offered these studies as guides to the various real estate boards and to their members in order that all of the brokers throughout the United States might be informed as to the fees and charges made generally throughout the

[9] The foreword or preamble to the Washington Board's constitution and by-laws states that every realtor (i.e. member) "has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association, and adopted by his own Board to govern real estate practices of members of the Board * * *" (Gov. Ex. 3, R. 462). The same statement is repeated in the application for membership in the Washington Board (Gov. Ex. 9, R. 511).

United States for services rendered in connection with real estate (*ibid.*). As expressed by appellee Nelson in 1935 in a letter describing a committee study to a member of the Washington Board (Gov. Ex. 30, R. 584):

> * * * The purpose of this Committee [on Rates, Rules and Customs] is to study the schedules now in existence and to see *if there could be developed something in the way of a national schedule* with proper provisions for regional and local variations and for variations due to size of cities.
>
> Insurance companies and other institutional investors having property in various cities complain constantly, and with justice, about the confusion and the seemingly illogical variations that now exist. If we can clarify this situation it may well be that we can improve the income of our membership and *gain wider acceptance for the fair charges established.* [Emphasis supplied.]

In 1946, the same officer of the National Association wrote (Gov. Ex. 48, R. 617–618):

> Generally speaking, most Boards have charges which are probably too low in relation to present costs of doing business. Often a Board will hesitate to increase its charges, fearing to lose business. *If all Boards can act together, each individual Board will gain confidence and strength from such action.* [Emphasis supplied.]

There was evidence that the Washington Board has, in considerable measure, been guided by the National Association's advice. Thus on February 10, 1939, a special "Commission Study Committee" of the Washington Board held a meeting to discuss changes in the schedule of commissions of the Washington Board (Gov. Ex. 12, R. 518–519). The minutes of this meeting stated in part (R. 519):

> * * * the suggestion [was] made that in view of the fact that the National Association had appointed a special committee on commission rates and rules that copy of its report might be obtained for the consideration of the Committee.
>
> * * * * * *
>
> After a further discussion a motion, duly carried, was made to the effect that the Committee *defer action on the recommendations of the Brokers Committee until such time as the Committee could come to a conclusion following its study of proposed service charges suggested by the National Association* and the recommendations of Mr. Luchs.
>
> It was suggested by Mr. Taylor that *as Mr. Bangs has been named a member of the National Association's Committee on Commission Rates and Rules it might be well to appoint him as a member of the present Committee.* [Emphasis supplied.]

The minutes of a meeting of the same committee held on May 10, 1939 (Gov. Ex. 27; R. 577–578) stated in part as follows (*ibid.*):

> Mr. Smith called the meeting to order and called upon *Mr. Bangs who made an informal report on the action of the National Association's Committee on Rates, Rules and Customs.* * * *
>
> It was the general sense of this Committee that should any change be made in the Washington Board's schedules that *the study being made by the National Committee would be highly essential and beneficial to the local Board.*
>
> It was brought out during the discussion that the resolutions of the National Committee would only be in the shape of a guide and not an attempt to force the adoption of a nation-wide commission schedule.
>
> Motion offered by Mr. Taylor, seconded by Mr. Koones, recommended that *no action be taken by this Committee in connection with the study of existing commission schedules until such time as the Washington Real Estate Board is in receipt of the recommendations of the Committee* on Rates, Rules and Customs, after their approval by the National Association of Real Estate Boards. This motion was unanimously adopted. [Emphasis supplied.]

On June 16, 1941, the Chairman of the Committee on Rates, Rules and Customs of the Na-

tional Association, of which H. C. Bangs of the Washington Board was a member (*supra*, p. 17; Gov. Ex. 17–A, R. 545), sent a letter to the Executive Secretary of the Washington Board enclosing copies of a "Guide" on commission rates, rules and customs prepared by the National Committee on this subject (Gov. Exs. 17, 17–A, R. 536, 537). This letter stated in part (Gov. Ex. 17, R. 536):

> It is the purpose of our Committee this year to try to perfect our guide and to bring the matter of improvement of local Board schedules before the delegates at the Detroit Convention in November.

The Guide contained suggested commission rates to be charged for the sale, exchange, lease and management of real property.

In a report to the National Association in January, 1942 appellee Nelson stated (Gov. Ex. 43, R. 616):

> As a result of the [Rates, Rules and Customs] Committee's activities many Boards are making complete studies of their existing schedules with a view toward changing them to conform as nearly as possible with the suggested National guide. It is interesting to note that the Boards which are changing their schedules are revising upwards.

The Washington Board in 1943 adopted a new schedule of commission rates for the sale of real property in the District of Columbia (Gov. Ex. 28,

R. 578) and in 1944 it again revised its schedule (Gov. Ex. 25, R. 569). The Secretary of the Washington Board testified that he "doubted" that the Board even considered the Guide (R. 126). However, the recommendations contained in the Guide and the changes adopted by the Washington Board in 1943, and in 1944, contain striking similarities. Thus, the National Association's "Guide" recommended a commission of 5% on the first $100,000 of the sales price, 3% on the next $400,000 and 2% on the balance; and a minimum commission on sales of improved property of $100 (Gov. Ex. 17 A, R. 544). The Washington Board changed its rate for "city" property from 5% on the first $5,000 and 3% on the balance (R. 387–388) to 5% of the sales price on the first $50,000 and 3% on the balance; and from a straight 5% on property in the outlying areas of the District to 5% on the first $50,000 and 3% on the balance (R. 578). The Board also changed its minimum commission from $50 to $100 (*ibid.*). In December 1944 when the Washington Board again changed its schedule of commissions, at least three of the changes consisted in the addition of new subsections to the schedule (see Gov. Ex. 23, R. 559–566), the language of which is virtually identical with that in paragraphs appearing in the "Guide" submitted by the National Association.[10]

[10] Section 1, subsection 6 of the 1944 schedule reads (Gov. Ex. 25, R. 569):

> When property is priced at a salable figure the Realtor may advertise such listed properties at his own expense,

The trial court found that neither appellee National Association nor appellee Nelson "conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of

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however, the mere listing or placing of properties with a Realtor does not impose an obligation upon him to advertise at his own expense.

Section IA of the "Guide" reads (R. 537):

> When property is priced at a rentable or salable figure, the agent may advertise such listed properties at his own expense. Mere listing or placing of such properties with an agent does not impose an obligation upon the agent to advertise at his own expense.

Section 3, subsection 10 of the 1944 schedule provides (R. 571):

> If an agent procrues a modification or cancellation of a lease, the regular rental commission shall be charged for what would have been the total of the remaining rental under the lease had it run to its conclusion, the commission to be paid by the party whom the agent represents, or according to advance agreement.

Section XII, H of the "Guide" reads as follows (R. 541):

> If an agent procures a cancellation of a lease, the regular rental commission shall be charged and applied to what would have been the total of the lease had it run to its conclusion, the commission to be paid by the party whom the agent represents, or according to advance agreement.

Subsection 9 of Section 5 of the schedule (R. 573) and the first sentence of Section XII J of the Guide (R. 541) are identical and read as follows:

> An agent shall handle each lease or sublease as a new transaction and shall charge the established rental commission on total gross rent.

Compare also Section 7 of the 1944 schedule (R. 574) with sections II, VI and XVII of the "Guide" (R. 537, 538, 545).

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Columbia" (Fng. 20, R. 434). In the light of the evidence recited above and the comments of the court during the trial,[11] it would appear that this finding is in reality a conclusion of law which followed from the court's determination that the rate-setting activities of the Washington Board are legal.[12]

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In concluding that the action of the defendants in publishing a standard rate of commissions charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act in the absence of a showing that such rates were unreasonable or oppressive in themselves or that they result in a

[11] During final argument by counsel for the National Association, the trial judge said (R. 341):

"The Court: Mr. Whiteford, does not this come down to a question of whether what the Washington Board did was legal or illegal, because whatever the Washington Board did, the National Board encouraged the Washington Board or incited the Washington Board to do? If what the Washington Board did is legal, then, of course, the activity of the National Board is praiseworthy. On the other hand, if what the Washington Board did is illegal, then the National Board is in the position of having advocated the doing of an illegal act."

[12] The court found that the members of the Washington Board perform personal services (Fng. 5, R. 433) and concluded that "For men to combine to regulate the compensation to be charged by them for their own services is entirely legal" (Concl. 2, R. 435).

substantial diminution of competition or otherwise create an unreasonable restraint of trade.

2. In finding that the schedules of standard commissions published by the Washington Real Estate Board have been construed by the members as non-mandatory in character.

3. In finding that there was no proof that the standard rate of commissions published by the Washington Real Estate Board is unreasonable or that this activity unreasonably restrains competition between brokers or adversely affects the sale of real estate.

4. In finding that neither the defendant National Association of Real Estate Boards nor the defendant Herbert U. Nelson conspired with the Washington Real Estate Board to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia.

5. In finding that before the Board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive overcharges, and that one of the purposes of the Board was to eliminate this undesirable condition.

6. In concluding that for men to combine to regulate the compensation to be charged by them for their own services is entirely legal.

7. In failing to grant the findings of fact requested by the plaintiff.

8. In entering a final judgment for the defendants.

SUMMARY OF ARGUMENT

I

The court below found that the Washington Board for many years has published real estate brokerage commission rates to which its members generally adhere. This alone would justify an inference of concerted action to fix rates, but in addition it is established by the undisputed evidence that the members of the Washington Board agreed upon the rates to be published and agreed to adhere to them. The finding of the court below that the rates have been construed as non-mandatory was plainly based upon its conclusion that no sanctions were imposed by the Washington Board for departure from the rate schedules. But the fact that no penalties are imposed for violation of trade restraining agreements does not make such agreements lawful. The "non-mandatory" finding cannot be interpreted as meaning that the members of the Washington Board did not obligate themselves to adhere to the published rates; if it were so interpreted, it would be irreconcilable with the court's opinion and the undisputed evidence.

The National Association has been a party to the combination of the Washington Board and its members to fix the commission rates. Its "Code of Ethics," to which the Washington

Board and its members are pledged to adhere, requires compliance with the rate schedule established by the Washington Board. And the National Association has aided in the formulation of that rate schedule.

II

This Court has held that both Sections 1 and 3 of the Sherman Act prohibit unreasonable restraints upon trade and commerce in services as well as goods. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427; *American Medical Assn.* v. *United States*, 317 U. S. 519; *United States* v. *Trenton Potteries*, 273 U. S. 392. Price fixing agreements among those engaged in selling either commodities or services have uniformly been held to create unreasonable restraints of trade *per se*. The underlying reasons for the rule apply with the same force to rate fixing by real estate brokers as to price fixing in other businesses. In suggesting that the appellees would have violated Section 3 of the Sherman Act only if they had fixed unreasonable or oppressive rates, the court below places upon the federal judiciary the very duty of determining reasonable prices which this Court has abjured during the life of the Sherman Act. If there are advantages in excepting real estate brokers from the Sherman Act and permitting them to charge uniform brokerage commissions, Congress should make the exception. It has not done so. In the legislative

scheme for the regulation of real estate brokers in the District of Columbia, Congress has given no authorization for rate fixing, public or private.

The Washington Board and its members are not exempt under Section 6 of the Clayton Act (*Columbia River Packers Assn., Inc.* v. *Hinton*, 315 U. S. 143; *American Medical Assn.* v. *United States*, 317 U. S. 519) which relates exclusively to "labor, agricultural, or horticultural organizations" and their members. The Washington Board is not such an organization. Its members are employers rather than employees. They are corporate and individual entrepreneurs who assume the risks of their businesses.

III

Because of the greater burden of proof resting on the Government in a criminal case and because of the procedural differences between civil and criminal actions, it is settled that an acquittal in a criminal action is not a bar to a subsequent civil action involving the same defendants and the same facts. Appellees' argument in the court below that the judgment in the criminal case is res judicata in the present action was based on the premise that their motion for judgment of acquittal was in the nature of a demurrer to the evidence and that the trial judge had accordingly assumed as true all the facts charged in the indictment. The motion, however, was made under Rule 29 of the Rules of Crimi-

nal Procedure which does not permit a challenge to the indictment. And the criminal trial judge's opinion not only discloses that he did not assume as true all the facts charged, but that no question as to the sufficiency of the indictment was considered by him. The judgment of acquittal constituted only a holding that the evidence proved was not sufficient to sustain a conviction, and, therefore, under the settled rule it can not constitute a bar to this action.

ARGUMENT

I

APPELLEES HAVE BEEN PARTIES TO A COMBINATION FIXING REAL ESTATE BROKERAGE COMMISSION RATES IN THE DISTRICT OF COLUMBIA

A. THE WASHINGTON BOARD HAS ESTABLISHED COMMISSION RATES TO WHICH ITS MEMBERS GENERALLY ADHERE

1. The district court made no explicit finding that the Washington Board and its members were parties to a combination prescribing commission rates for real estate brokerage transactions in the District of Columbia. However, the court's opinion, discussing the questions of law involved in this appeal, was predicated on an implicit finding of such combination (R. 437–440). And the findings which the court did make, the answer of the Washington Board to the allegations of combination contained in the complaint, and the undisputed evidence detailed in the Statement, *supra*, clearly establish the existence of the combination

and the general adherence by the members to the rates which the court below stated the Board had "prescribed" (Op. R. 438).

Proof of the existence of the Washington Board's schedule of rates of commissions and of the fact that such schedule has generally been adhered to would in itself be sufficient evidence to justify the inference of the existence of concerted action to fix rates. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377; *United States* v. *American Linseed Oil Co.*, 262 U. S. 371; *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *United States* v. *Paramount Pictures*, 334 U. S. 131, 142. But the evidence in this case goes far beyond that in the cases just cited. In addition to the evidence of adherence, there is direct and specific proof of consensual action. Thus, for example, at the special meeting of members of the Washington Board on February 16, 1943, the Board agreed upon a rate of commission for the sale of real estate in the District of Columbia, superseding rates which had been established previously. Such action was taken only after an extended study of two years (R. 22) by the Brokers' Committee and after approval of the proposed new sales commission rates by the Board of Directors of the Washington Board (Gov. Ex. 19, R. 549–550). Again, at a meeting on December 19, 1944, the Washington Board and its members agreed on a change in commis-

sion rates for long-term leases and a revision of the property management schedule (Gov. Ex. 24, R. 566–568; see also Gov. Ex. 23, R. 559–560).

Illustrative of the documentary evidence of these agreements was a special bulletin sent by the Executive Secretary of the Washington Board to all active members notifying them of the action taken at the meeting of February 16, 1943 (Gov. Ex. 21, R. 555–556) and stating in part:

> Placing the entire District of Columbia into one commission zone was accomplished this week when members of the Washington Real Estate Board *formally agreed* to the elimination of the two commission boundary zones which have been in existence for more than 20 years. [Italics supplied.]
>
> * * * * *
>
> The minimum commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000.00 and 3% on the excess above $50,000.00.
>
> The minimum commission for any sale shall be $100.00.

Each of the representatives of the Washington Board who was called as a witness frankly admitted that these agreements were made. In response to questions as to the meeting of February 16, 1943, the witness Beitzell, a second vice-president and member of the Washington Board (R. 251) testified (R. 255):

A. The members of the Washington Board, those who were present, voted in favor of the change.

Q. They agreed then, did they, that the standard rates of commission on the sale of real estate in the District was to be 5% on the first $50,000 and 3% on the excess; is that correct?

A. That is correct, to the best of my knowledge.

The witness Buchanan, a member and a former director of the Washington Board (R. 274), testified (R. 278):

Q. Is it not true that you agreed at this meeting, with all the other members of the Board, that the standard rate of commission on the sales of real estate in Washington was to be 5% on the first $50,000 and 3% on the excess?

A. That is right.

Q. Did you feel, Mr. Buchanan, at that time, that uniform action by members of the Board with respect to commission rates was advisable?

* * * * *

A. It was necessary. You can't change a commission rate without changing the by-laws, and you can't change those without action of the members of the Board.

The court inquired of this witness (R. 294):

The COURT: * * * I am trying to find out why was it necessary at all to have the Washington Real Estate Board meet

and agree on a reasonable rate of 5% on the first $50,000?

The WITNESS: Because in the vast majority of cases, those are the proper rates and what we consider an equitable pay for a broker's services.

The COURT: Those are the rates that you agreed upon?

The WITNESS: That is right * * *

The witness Rush, Executive Secretary of the Washington Board, testified to the same effect, as follows (R. 128):

> Q. Mr. Rush, did the members of the Washington Board agree that a standard rate of commission on sales of real property in the District of Columbia should be 5% on the first $50,000 and 3% on the balance at the meeting of February 16, 1943, about which your counsel asked you?
>
> A. Yes, the members voted.

The court below found that the Code of Ethics of the Washington Board provides that "brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates." (Fng. 15, R. 434; Gov. Ex. 5, R. 478.) The court found that before a broker is allowed to join the Washington Board he is "required to fill out and sign an application form" which provides that the "applicant agrees to subscribe to the Constitution and By-Laws, Code of Ethics and other rules of the Washington Real Estate Board." (Fng. 9, R. 433; see

Gov. Exs. 9–11, R. 512, 515, 517.) Not only are "members of the Board * * * urged to use this schedule of standard commissions" (Fng. 7, R. 433) but as the Washington Board admitted in its answer (Par. 18, R. 386–387) all its members are required to agree as a condition of membership to abide by the Code of Ethics. And it has been understood by the Washington Board and its members that in normal cases it was not "ethical or proper" for members of the Board to solicit business at rates lower than those published in the schedule of commissions (R. 80).

2. The district court found that the rates in the schedules "have been construed by the members as non-mandatory in character" (Fng. 16, R. 434). Apparently the court in making this finding was referring to the evidence that the Board had never penalized members for failure to adhere to the schedule (see Statement, *supra,* pp. 11–12). The fact, however, that no penalties are imposed for violations of trade restraining agreements is irrelevant. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377, 411; *Eastern States Lumber Ass'n* v. *United States,* 234 U. S. 600, 608; *Federal Trade Commission* v. *Pacific Paper Association,* 273 U. S. 52, 62. As the Court stated in the *Pacific Paper Association* case, "An understanding, express or tacit, that the agreed prices will be followed is enough to constitute a transgression of the law. No provision to compel adherence is necessary."

(273 U. S. at 62.) Here, as in the *American Column & Lumber* case, *supra*, at p. 411, the defendants relied for maintenance of concerted action "not upon fines and forfeitures * * * but upon what experience has shown to be the more potent and dependable restraints, of business honor and social penalties * * *."[13]

The essential element of an offense under the Sherman Act is the agreement, and it is immaterial whether it has been carried out. *Nash* v. *United States*, 229 U. S. 373, *United States* v. *Trenton Potteries*, 273 U. S. 392, 402; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225n. The evidence in the present case shows not only agreement upon the rate schedules—sufficient to establish a violation of the Act—but also general adherence to the agreed schedules. As the court below said, "In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board" (Op. R. 438).

[13] It has been pointed out in the Statement, *supra*, pp. 10–11, that the Washington Board actually possesses the power to take disciplinary action for violations of rate schedules. The failure to use that power does not remove its coercive effect. As stated in a comparable situation arising under the Clayton Act, "The fact that the lessor in many instances forbore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act." *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 458.

Appellees may contend that the finding that the published rates were "non-mandatory" represents a determination by the court that the members of the Washington Board were under no obligation to adhere to the rates it adopted. Such an interpretation of the finding would be entirely inconsistent with the grounds which the court relied upon in its opinion. If the court had concluded that the parties did not intend that the Washington Board members conform to the schedule of commission charges which the Board adopted, then it would have found that there had been no agreement, combination or conspiracy as to the rates to be charged. That would have been the end of the case, and the court would not have had to go further. The sole question which the court considered, whether an agreement fixing rates to be charged for personal services is illegal *per se*, need not have been reached.

In addition, if the "non-mandatory" finding is interpreted as a finding that there was no obligation to adhere to the adopted rates, it is contrary to the undisputed evidence. The Executive Secretary of the Washington Board, in response to inquiries from members as to whether they could cut rates without violating their agreement with the Board, repeatedly replied that it was "unethical and improper" to cut these rates (R. 129). The Secretary was unable to recall a single instance in which the Board had advised

a member that its rules permitted sales at less than the standard rates (R. 129).

One of the objects of the Board as expressed in its Constitution and By-Laws (Gov. Ex. 3, R. 462) is to "assure to the public the services of responsible and trustworthy agents and brokers, acting on *definite and uniform standards of contracts and charges* * * *." [Emphasis supplied.] "Uniform standards" of charges could hardly be achieved if Board members are under no obligation to adhere to the rates adopted and published by the Board.

There is not the faintest suggestion in the various schedules of commissions that the rates are merely advisory. The schedule of commissions was "made part of the ethics" of the Washington Board (R. 24) because, as its counsel made clear in his opening statement (R. 24), "theretofore the business of selling and exchanging and leasing and managing real estate was a matter of every real estate agent charging about what he could get."

Finally, appellees themselves in their writings prior to this action repeatedly referred to their activities as "rate-fixing."[14] In the minutes of

[14] Indeed in the ninth defense in the answer of the Washington Board in the instant case (R. 391), the Board tacitly concedes that its members have combined to make an "offer" to the public "to perform professional services at the standard rates specified" and if the clients do not desire to pay the established rates they must look to brokers who are not members of the Board or the National Association.

the meeting of February 16, 1943 at which the rates were changed, the committee recommending the change referred to the fact that the Board "fixes the District of Columbia rate" (see *supra*, p. 9). And the Washington Board prepared for and issued to its members a standard form sales contract referring to the "rate of commission fixed by the Washington Real Estate Board" (see *supra*, note 3, p. 7).[15]

In any event, whether or not the members were under an obligation to adhere to the rates adopted and published by the Board is irrelevant. Proof of the price-fixing combination was complete when it was shown that the Washington Board adopted and published a schedule of commissions and that the members of the Board generally adhered to the rates so adopted. If the carefully worked out and generally observed schedule of commissions established by the Washington Board and its members does not reflect a combination to fix such commissions, then group action in establishing rates and general adherence

[15] In this connection the testimony of the Secretary of the Washington Board is significant. When asked why, if the rates were optional, the members did not ignore the rate zone boundaries existing prior to 1943, Mr. Rush stated (R. 129–130): "* * * because the public generally looked to the Real Estate Board for a standard rate of commission which would be fair and equitable and the Board * * * had built up a reputation for fair dealing, *fair compensation*, *fair rates*, *uniform rates* * * *". [Emphasis supplied.]

to the rates so established may be immunized by a mental reservation that the rates are not binding. If the type of collaboration on rates here involved is held not to constitute rate fixing, the door is open wide to effective evasion of the anti-trust laws.

B. THE NATIONAL ASSOCIATION AND NELSON HAVE AIDED AND ENCOURAGED THE WASHINGTON BOARD TO FIX COMMISSION RATES

There can be no doubt, as the trial court suggested, that "whatever the Washington Board did, the National encouraged the Washington Board or incited the Washington Board to do" (*supra*, note 11, p. 22). In fact, the National Association does more than encourage and incite rate fixing, since it makes adherence to its code of ethics a condition of membership, and that code provides that the "schedules of fees" established by the various real estate boards * * * should be observed by every Realtor" (*supra*, p. 14). Not only are local boards subject to expulsion for neglect or refusal to maintain and enforce the Code of Ethics, but each member board is explicitly required to adopt the code as "a part of its rules and regulations for violation of which disciplinary action may be taken" (*supra*, pp. 14–15).

This explicit language of the National Association's by-laws may not be assumed to be mere window dressing, in the absence of any proof to

that effect. No such proof was adduced.[16] The evidence at most indicates that local boards have not been subjected to disciplinary action by the National Association (R. 225). But the availability of sanctions for breach of an agreement in restraint of trade is not requisite to the existence of such an agreement, and certainly actual employment of sanctions which are available is not requisite (*supra*, p. 32). That some members of the Washington Board may have had mental reservations regarding their pledges to the National Association (e. g., R. 264, 292), is likewise immaterial. The members of the Washington Board have substantially adhered to the rates which it fixed.[17]

The character of the evidence here is strikingly similar to that in *Associated Press* v. *United States*, 326 U. S. 1. There, the district court had granted the Government's motion for summary judgment and based its decision almost entirely on the provisions in the By-Laws of the Associated Press. This Court stated (326 U. S. at pp. 8, 12):

[16] Appellee Nelson testified that the National Association's Code of Ethics was merely an "ideal" set forth for the members (R. 224), but admitted that the National Association has the power to expel a member for breach of the Code. (R. 225.)

[17] Indeed, appellee Nelson testified (R. 225) that no violation of the code by the members of the Washington Board had been brought to his attention.

> To put the issue into proper focus, it becomes necessary at this juncture to examine the By-Laws.
>
> All members must consent to be bound by them. They impose upon members certain duties and restrictions in the conduct of their separate businesses. For a violation of the By-Laws severe disciplinary action may be taken by the Association.
>
> * * * * *
>
> * * * the court below found, and we think correctly, that the By-Laws on their face, and without regard to their past effect, constitute restraints of trade. Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other." [Citing cases.]

The Code of Ethics of the National Association, together with (a) the agreement of the Washington Board to maintain and enforce it, and (b) the separate agreements of the respective members of the Washington Board to observe it, constitute a series of agreements to destroy rate competition among members of the Washington Board by preventing them from charging whatever rates they desire. The fact that the National Association did not itself determine the rates to be charged by members of the Wash-

ington Board does not relieve it from participation in a price-fixing scheme. As this Court said in *United States* v. *Masonite Corp.*, 316 U. S. 265, 276:

> The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.

Nor would it be significant if the Washington Board had never consulted with the National Association in determining the rates to be charged by their members in the District of Columbia. A combination which delegates to one of its members the power to fix a price that all members agree to observe is just as illegal as a combination that contemplates that all members will participate directly in the selection of particular prices. *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Masonite Corp., supra.*

We submit that the Government is entitled to judgment against the National Association on the basis of its by-laws and code of ethics alone. If further evidence be needed, it is to be found in the activities of the National Association in preparing and distributing its "Guide on Rates, Rules and Customs". We have detailed that evidence in the Statement, *supra*, pp. 15–22, and it will merely be briefly summarized here. It shows that the National Association maintained a committee which studied brokerage commission rates in the

United States and offered to the local boards the results of its studies in the form of suggested rates to be charged for the sale, exchange, lease and management of real property. Appellee Nelson has stated that the purpose of this activity was to develop "something in the way of a national schedule" (R. 584) and in 1942 reported that many Boards were studying their schedules "with a view towards changing them to conform as nearly as possible with the suggested National Guide" (Gov. Ex. 43, R. 616).

Despite the testimony of the Executive Secretary of the Washington Board that "I doubt" if the Guide was "even considered" by the Washington Board (R. 126), the documentary evidence previously set out (*supra*, pp. 20–21) conclusively shows that the Washington Board has closely followed the recommendations of the "Guide".[18] Thus, for example, the language of several additions to the schedule of commissions adopted by the Board in 1944 follows virtually word for word the language suggested in the "Guide". The substantial identity of such technical language cannot be explained as coincidental.

In sum, the National Association and appellee Nelson are shown by this record to have encour-

[18] Plainly this documentary evidence would be entitled to greater weight than the oral testimony of an officer of a defendant (*United States* v. *United States Gypsum Company*, 333 U. S. 364, 395–396) even if the oral testimony were more positive.

aged the rate-setting activities of the Washington Board (1) by requiring the members of the National Association in the District of Columbia as a condition of membership to agree that the rates established by the Washington Board should be observed, and (2) by giving detailed assistance to the Washington Board in formulating the rates which it prescribes. If, as we contend, the Washington Board and its members have violated the Sherman Act, it is manifest that the National Association and appellee Nelson have been leading participants in that violation. It seems clear that the trial judge's finding that neither the National Association nor appellee Nelson "conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia" (Fng. 20, R. 434) can only be explained as a corollary of his conclusion that the Washington Board's activities are legal. The trial judge's colloquy with counsel (*supra*, p. 22) clearly so indicated. And his failure to discuss in his opinion, or to make findings as to any of the probative facts with respect to the National Association's activities, although requested by the Government so to do (R. 352–353, 430–432), reinforces this inference. If, however, the finding imports a determination that the National Association has not been a party to the rate-setting combination, it is evident that the finding flies in

the face of overwhelming and indisputable evidence.

II

THE COMBINATION FIXING REAL ESTATE BROKERAGE COMMISSION RATES IN THE DISTRICT OF COLUMBIA CONSTITUTES *per se* A VIOLATION OF SECTION 3 OF THE SHERMAN ACT

The court below recognized the established principle that price fixing in the case of commodities constitutes an unreasonable restraint of trade *per se* (R. 439), but it held that principle to be inapplicable to rate fixing in the case of the services rendered by real estate brokers. The court also concluded that "For men to combine to regulate the compensation to be charged by them for their own services is entirely legal" (Concl. 2, R. 435). This conclusion might import a holding that the Washington Board is entitled to exemption from the antitrust laws as a labor union, or, on the other hand, the court may have held that fixing brokerage fees is not unreasonable *per se*.[19] In any event, whether

[19] The court likened a real estate board to a labor union (Op. R. 439) despite the fact that real estate brokers are frequently not only employers (R. 250–251, 263, 273, 296, 297), but corporations, and that the court found such to be the case with some members of the Washington Board (Fng. 3, R. 433). But the sentence in the opinion which appears to constitute the only *holding* reads as follows (R. 440):

"The Court is of the opinion that for persons engaged in a particular occupation to fix or prescribe a standard charge for their services does not alone and of itself create an unrea-

the court based its ultimate decision on the view that combinations in respect of personal services are not within the reach of the Sherman Act, or the more restricted view that combinations to fix the rates charged for such services may be shown to create an unreasonable restraint but are not illegal *per se*, we think its decision was demonstrably erroneous.

A. THE PER SE RULE APPLIED TO PRICE-FIXING HAS EQUAL APPLICATION TO RATE-FIXING BY REAL ESTATE BROKERS

This Court has consistently held that both Sections 1 and 3 of the Sherman Act prohibit unreasonable restraints upon trade and commerce in services as well as goods. *United States* v. *Trans-Missouri Freight Association;* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505 (transportation services); *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U. S. 427 (cleaning, dyeing and renovating wearing apparel); *Associated Press* v. *United States,* 326 U. S. 1 (news services); *American Medical Association* v. *United States,* 317 U. S. 519 (medical and hospital services); *United States* v. *Para-*

sonable restraint of trade in violation of the Sherman Act."

And the statement immediately following makes it even clearer that the court had no thought of declaring appellees' activities exempt from the Act (R. 440):

"* * * A different problem might be presented if the rates fixed were shown to be unreasonable or oppressive in themselves or if it appeared that they resulted in a substantial diminution of competition or otherwise created an unreasonable restraint of trade or commerce."

mount Pictures, Inc., 334 U. S. 131 (distribution and exhibition of motion pictures). See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, 495, 498.[20]

The *Atlantic Cleaners & Dyers* case, *supra*, is apposite here. The defendants in that case were engaged in the business of performing cleaning, dyeing and renovating services in the District of Columbia. They defended the action on the ground that "they were engaged solely in the performance of labor and rendering service" (286 U. S. at 431) and so were not engaged in trade or

[20] The lower federal courts have held that the Sherman Act applies to restraints upon the practice of medicine by individual physicians (*United States* v. *American Medical Association*, 110 F. 2d 703, 710 (C. A. D. C.), certiorari denied, 310 U. S. 644); theatrical entertainment (*Ring* v. *Spina*, 148 F. 2d 647 (C. A. 2)); the exhibition of professional baseball games and the transmission of broadcasts and telecasts thereof (*Gardella* v. *Chandler*, 172 F. 2d 402 (C. A. 2)); and performance of musical compositions (*Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, 80 F. Supp. 888 (S. D. N. Y.)).

There are also numerous state court decisions holding that agreements fixing prices for services violate state antitrust laws or common law rules. *More* v. *Bennett*, 140 Ill. 69, 29 N. E. 888 (legal stenographers); *Graf* v. *Master Horse-Shoers' Protective Assn.*, 1 Ohio N. P. (N. S.) 423 (blacksmiths); *Bailey* v. *Association of Master Plumbers*, 103 Tenn. 99, 52 S. W. 853 (plumbers); *Gatzow* v. *Buening*, 106 Wisc. 1, 81 N. W. 1003 (liverymen); *Employing Printers Club* v. *Dr. Blosser Co.*, 122 Ga. 509, 50 S. E. 353 (printers); *State* v. *Wilson*, 73 Kans. 343, 84 Pac. 737 (livestock dealers' commissions). *Contra: State* v. *Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395 (grain dealers' commissions); but see *Campbell* v. *Motion Picture Machine Operators' Union*, 151 Minn. 220, 186 N. W. 781 (exhibition of motion pictures).

commerce. In rejecting that defense, this Court expressly adopted the broad interpretation of the word "trade" found in the following language of Mr. Justice Story on circuit in *The Schooner Nymph*, 18 Fed. Cas. 506, 507 (D. Me.) (286 U. S. at 436–437):

> The argument for the claimant insists, that "trade" is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word "trade" is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*. Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoemaker, though some of these may be, and sometimes are, carried on without buying or selling goods.

Price-fixing agreements among those engaged either in selling commodities or in providing services have consistently been held to create unreasonable restraints of trade *per se*. *Trans-Missouri Freight Association* and *Joint Traffic*

Association cases, *supra*; *United States* v. *Trenton Potteries*, 273 U. S. 392; *Atlantic Cleaners & Dyers* case, *supra*; *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150; *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 535–436; *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 143; *United States* v. *Maryland & Virginia Milk Producers Association, Inc.*, C. A. D. C., decided June 17, 1949 (C. C. H. Tr. Reg. Rep. 48–51, par. 62,452) certiorari denied, 338 U. S. 831; *Ring* v. *Spina*, 148 F. 2d 647, 650–651 (C. A. 2).

Hopkins v. *United States*, 171 U. S. 578, and *Anderson* v. *United States*, 171 U. S. 604, upon which appellees may rely, create no exception to the *per se* rule. The holding in the *Hopkins* case was that livestock commission merchants were not engaged in interstate commerce.[21] The *Anderson* case held that a rule of a livestock exchange requiring members not to recognize any trader not a member of the exchange did not effect an unreasonable restraint of trade and was therefore not outlawed by Section 1 of the Sherman Act. Neither case establishes the proposition that

[21] That holding is clearly inapplicable to this case which involves only trade or commerce in the District of Columbia. Moreover, as this Court has noted, the case was in effect overruled by *Stafford* v. *Wallace*, 258 U. S. 495. See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230, note 9; *Wickard* v. *Filburn*, 317 U. S. 111, 121–122, note 20.

the *per se* rule is inapplicable to combinations involving services, and the cases cited above clearly demonstrate that no such implied limitation is to be found in the Act.

The court below apparently regarded the distinction between what it termed "personal services" and other types of services as crucial, and declined to apply the *per se* rule to the former. Even if it be assumed, *arguendo,* that the distinction has validity, it is difficult to see its application here. Some of the members of the Washington Board may be individuals working alone, and, if so, the services rendered by them are "personal" in the sense that the members themselves perform them. But other members of the Washington Board, as the court found, are incorporated (Fng. 3, R. 433) or employ salesmen. (Statement, *supra,* p. 6.) To call the services rendered by them "personal" is to make any and all kinds of services personal.

Even if it were applicable to this case, the distinction drawn by the district court between "personal" and other services finds no support in the cases arising under the Sherman Act. Certainly this Court has made no such distinction. In the *Atlantic Cleaners & Dyers* case, *supra,* the record reveals that this Court had before it the appeal of (a) four corporations engaged in the business of cleaning clothes and four of their officers, and (b) two individuals who were in the cleaning business as a partnership (O. T. 1931, No. 667,

record pp. 2, 25). There was no allegation in the complaint that the particular prices agreed upon were unreasonable, but merely an agreement to raise the current prices, to adhere thereafter to certain agreed minimum and uniform prices and to allocate customers. The conduct charged was held to violate Section 3 of the Sherman Act.

In *Ring* v. *Spina,* supra, the question was raised as to the legality under Section 1 of the Sherman Act of the contracts of the Dramatists' Guild of the Authors' League of America, an association of playwrights. The evidence showed that a producer of plays was compelled to sign the Guild's "Minimum Basic Agreement" before any Guild member-author was permitted to license others to use his plays. That Agreement fixed the minimum prices for plays to be paid by the producer. Plaintiff alleged that he was forced to sign the Agreement and sought a temporary injunction prohibiting defendants from enforcing it. The decision of the district court denying the temporary injunction was reversed.[22]

The Court of Appeals for the Second Circuit noted that the purpose of the Minimum Basic Agreement was, in the words of the Guild's president, " 'to produce a fair return for the labor of its members who write plays for a living' " (148 F. 2d at 651). While recognizing that the Agreement fixed the

[22] After a trial on remand, a permanent injunction was granted by Judge Rifkind. *Ring* v. *Spina,* 84 F. Supp. 403 (S. D. N. Y.).

compensation to be charged by playwrights for their own services, the court relied on the *Trenton Potteries* and *Socony-Vacuum Oil* cases in holding that a "'price-fixing combination' is 'illegal per se'" (p. 650) and "is not saved by the high purpose for which it is conceived" (p. 651).[23]

Whatever the precise nature of the distinction between personal services envisioned by the court below, we submit that the underlying reasons for the consistent application by this Court of the *per se* rule to price fixing apply with equal force to the real estate brokerage business. The primary reason underlying the rule was first clearly stated by this Court in the *Trenton Potteries* case, *supra*, where this Court said (273 U. S. at 397–8):

> The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of

[23] Cf. *United States* v. *Sugar Institute*, 15 F. Supp. 817 (S. D. N. Y.), modified on other grounds and affirmed, 297 U. S. 553. One of the several questions involved in that case was the legality of an agreement fixing sugar brokers' commissions. Judge Mack said (at p. 903):

"* * * the commission is an important element in the cost of sugar. The evidence indicated that there was active competition for brokerage service prior to Institute action regulating brokers' commissions. Fairness in the commission rate does not validate an agreement, otherwise illegal. Trenton Potteries Co. Case, supra; * * *."

> the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.[24]

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[24] Compare the following language from the Court's opinion in the *Trans-Missouri Freight Association* case, *supra*, 166 U. S. at 331-2:.

"What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question."

The court below apparently believed that the defendants would have violated Section 3 of the Sherman Act if they had been shown to have fixed rates that were "unreasonable or oppressive in themselves" (Op. R. 440; Concl. 1, R. 435). If legality thus depended upon whether the rates fixed were unreasonable or oppressive, the courts would be required to determine in each case what constitutes reasonable commission rates. For if, as to agreements fixing either prices for goods or rates for so-called personal services, the courts must draw the line between agreements fixing unreasonable or oppressive prices or rates, which are outlawed, and agreements fixing reasonable prices or rates, which are permissible, the courts will thereby be indirectly vested with rate-making powers and duties. But this Court has consistently rejected a construction of the Sherman Act which would impose such a burden on the Government and the courts.

In rejecting the application of the *per se* rule, the court below suggested that the decision might have gone the other way if it had appeared that the rates fixed resulted in "a substantial diminution of competition or otherwise created an unreasonable restraint of trade" (Op. R. 440). But the court's own findings demonstrate that the Washington Board members do a substantial portion of the real estate brokerage business in the District of Columbia (Fng. 2, R. 433) and that they generally adhere to the prescribed

rates (Fngs. 11, 12, R. 434). Since price competition is obviously thereby substantially diminished, it can only be inferred that the court below regarded price competition as relatively unimportant. That view is directly contrary to the oft repeated view of this Court, recently reiterated in *United States* v. *Line Material Co.*, 333 U. S. 287, 309, that "there can be no clearer evidence of restraint of trade" than control of prices. Indeed, the present record is a reflection of the truism that the almost inevitable consequence of price-fixing by those who furnish goods or services is increase in prices.[25]

The answer of the Washington Board contended that the public interest was served by having the members of the Washington Board jointly offer their services at a fixed, uniform rate of commission (R. 389, 390, 392). And the court below also suggested that rate-fixing in the real estate brokerage business "has generally been considered as being in the public interest" (Op. R. 440).[26] While not spelled out, it was implied that

[25] See Gov. Exs. 20 (R. 552–554), 43 (R. 616) and 48 (R. 617–618); Fng. 10, R. 433–434.

[26] The court apparently thought that the long continuation of rate-fixing by real estate brokers gave that practice a certain sanctity. But compare *United States* v. *Associated Press*, 52 F. Supp. 362, 364 (S. D. N. Y.) affirmed, 326 U. S. 1, where some of the unlawful by-laws had been in effect for over 40 years and were not shown to have been concealed from the public; and the long-standing rate-fixing practices of private combinations in the insurance industry declared unlawful in the *South-Eastern Underwriters* case, *supra*.

the public interest in preventing extortionate charges is greater than the loss of the benefits of rate competition. The district court indicated in its opinion and findings that elimination of "overcharges" was one of the advantages deriving from the Washington Board's operations.[27] It should be noted, however, that appellees offered no proof, aside from their own unsupported assertions, that the present rates themselves are not "overcharges."[28]

Those policy considerations that argue for uniformity and standardization of real estate brokers' commissions apply with equal force to fire insurance premiums and insurance agents' commissions. Yet this Court applied the *per se* rule to a combination fixing rates for these premiums and commissions in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 535–536.

[27] (R. 438, Fng. 14, R. 434). Conceding, *arguendo*, that the activities of the Board tend to eliminate variations in rates, we suggest that this conclusion is hardly consistent with any contention that the Washington Board did not agree upon rates (see *supra*, Point I). The Government felt compelled to assign this finding (14) as error, because there was no evidence in the record to support the statement that there was "chaos and confusion" in the District of Columbia before the Washington Board attempted to fix rates (see note 6, *supra*, p. 10).

[28] The Court of Appeals for the District of Columbia has labeled the commission rate fixed by the Board for obtaining a lease as "unconscionable" on its face. *Hecht Co.* v. *Whiteford*, 137 F. 2d 929, 931 (C. A. D. C.), certiorari denied, 320 U. S. 795.

And the Court's condemnation of any judicial sanction of price-fixing on asserted public policy grounds was made unmistakably clear in *United States* v. *Socony-Vacuum Oil Co., supra.* The Court said (310 U. S. at pp. 221–2):

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress * * * the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.

If any doubts remained, they would be put at rest by the language of the Court in *United States* v. *Line Material Co.*, 333 U. S. 287, 309–310:

> Despite possible advantages to a stable economy from efficient cartels with firm or fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpretations of the Sherman Act that competition on prices is the rule of congressional purpose and that, where exceptions are made, Congress should make them.

If price competition is to be the rule unless Congress creates an exception, price competition should be the rule in the real estate brokerage business in the District of Columbia. There are no peculiarities of the real estate business of which we are aware that should cause this Court to adopt a different rule regarding real estate brokerage rate-fixing than was adopted by this Court for premiums for fire insurance and agents' commissions, prices for cleaning and dyeing clothes or by the Court of Appeals for charges for licensing production of plays.

The legislative scheme for the regulation of real estate brokers in the District of Columbia contains no authorization of rate-fixing—public or private. On August 25, 1937, Congress enacted a law (50 Stat. 787) "To define, regulate, and license real-estate brokers, business chance brokers, and real-estate salesmen; to create a Real Estate Commission in the District of Columbia; to protect the public against fraud in real-estate transactions; and for other purposes."[29] The Act empowers the Commission to license only those who are "trustworthy and competent" (Sec. 4, 50 Stat. 789). The Act did not authorize the Commission to regulate rates of commission for brokers. Section 16 (50 Stat. 797) provides in part:

> This Act shall not be construed to release any person, partnership, association, or corporation from civil liability or criminal

[29] This law was amended in 1939 in respects not here pertinent. 53 Stat. 1352.

> prosecution under the laws applying to the District of Columbia.

In the light of this expression of Congressional intent, we submit that this Court may assume that Congress did not conceive it to be in the public interest to delegate the power to the courts, to the Real Estate Commission or to the appellees to fix rates—reasonable or otherwise—for real estate brokers' services in the District of Columbia.

B. THE RATE-FIXING ACTIVITIES OF REAL ESTATE BROKERS ARE NOT EXEMPTED FROM THE SHERMAN ACT BY SECTION 6 OF THE CLAYTON ACT

Finally, the court below likened the Washington Board "to a labor union of real estate brokers" (R. 439), and implied that it is exempted from the prohibitions of the Sherman Act by what the court termed "the pertinent public policy in respect to personal services" (R. 439) to be found in Section 6 of the Clayton Act (38 Stat. 730, 731; 15 U. S. C. 17).[30] That Section provides as follows:

> SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid

[30] As pointed out previously, *supra*, pp. 43–44, we think it probable that the court did not actually hold that such an exemption applies.

> or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 6 relates exclusively to "labor, agricultural, or horticultural organizations" and their members. The Washington Board is not such an organization. Members of the Washington Board are employers rather than employees. They occupy offices (Gov. Ex. 20, R. 553) and commonly employ varying numbers of salesmen (R. 250–251, 263, 273, 280). Their brokerage services involve no employer-employee relationship, but are rendered pursuant to a series of independent contracts, each with a separate customer (see Gov. Ex. 26, R. 575). It is settled by the decisions of this Court that activities of this character lie wholly outside the scope of Section 6 of the Clayton Act, as well as outside of Section 20 of the Clayton Act and the related provisions of the Norris-LaGuardia Act (47 Stat. 70, 73, 29 U. S. C. 101, 113).[31]

In *Columbia River Packers Association, Inc.* v. *Hinton,* 315 U. S. 143, the Packers Association had sued for an injunction to restrain numerous fishermen and their union from engaging in cer-

[31] These sections implement Section 6 by restricting the power of federal courts to issue injunctions in cases involving or growing out of labor disputes.

tain activities alleged to constitute an attempt to monopolize the fishing industry in the Northwest in violation of the Sherman Act. Defendants contended that the Norris-LaGuardia Act removed jurisdiction from the federal courts to issue an injunction in the case. This Court noted that the fishermen owned boats and carried on their business as "independent entrepreneurs", held that the Clayton and Norris-LaGuardia Acts do not "include controversies upon which the employer-employee relationship has no bearing", and distinguished its decisions in *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, and *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, by observing that there the "employer-employee relationship was the matrix of the controversy" (p. 147).

In the *American Medical Association* case, 317 U. S. 519, the District Medical Society contended that a dispute between it and Group Health involved terms and conditions of employment of the doctors hired by Group Health, and on that ground claimed immunity under Section 20 of the Clayton Act as expanded by Section 13 of the Norris-LaGuardia Act. This Court held that the District Medical Society was not "an association of employes in any proper sense of the term" but was "an association of individual practitioners each exercising his calling as an independent unit" and therefore not covered by the Clayton and

Norris-LaGuardia Acts (p. 536). See also *American Medical Association* v. *United States*, 130 F. 2d 233, 243 (C. A. D. C.), affirmed, 317 U. S. 519.

In *United States* v. *Women's Sportswear Manufacturers Association*, 336 U. S. 460, 463–464, decided at the last term, the defendants claimed immunity under the Clayton Act from charges that they were combining to restrain trade in violation of the Sherman Act by compelling their customers to agree not to permit non-members of the defendant Association to stitch garments. This Court found that the stitching contractors were entrepreneurs, not employees, and stated:

> The stitching contractor, although he furnishes chiefly labor, also utilizes the labor through machines and has his rentals, capital costs, overhead and profits. He is an entrepreneur, not a laborer.[32]

In *Ring* v. *Spina*, 148 F. 2d 647 (C. A. 2), the Dramatists' Guild contended that it was a labor organization and that its members were laborers within the meaning of Section 6 of the Clayton Act. The court stated (148 F. 2d at 652):

> Here not only are the disputing parties not in an employer-employee relationship, but, unlike the Allen Bradley case, the controversy cannot concern itself with conditions of employment, since none of the parties affected are in any true sense employees.

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[32] Compare Gov. Exs. 20 (R. 553) and 48 (R. 618) where appellees refer to real estate brokers' "costs of doing business."

> An author writing a book or play is usually not then even in any contractual relation with his producer. If and when he does contract, he does not continue in the producer's service to any appreciable or continuous extent thereafter. Normally the author appears more nearly like the fishermen entrepreneurs of the Hinton case or the doctors in the American Medical Association case than workmen banded together in a union. The minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold. And no wages or working conditions of any group of employees are directly dependent on these terms. We think the exception therefore inapplicable.

Assuming, as the court below believed, that there is no distinction under the Clayton Act between salaries and commissions and that the word "labor", as used in the Act, comprises intellectual as well as manual labor (Op. R. 439), this obviously does not make all commissions the product of labor. The district court apparently considered the fact that both laborers and real estate brokers perform "personal services" to be the crucial common denominator. But this Court in the cases cited and the court of appeals in *Ring* v. *Spina* has found the crucial distinction to lie

neither in the method of payments nor in the character of the work but rather in whether the "labor" is that of an employee or that of an entrepreneur who assumes the risk of the business. Tested by such standards the members of the Washington Board are clearly shown to be independent businessmen, not employees of a labor organization. They seek profits, not wages.

III

THE JUDGMENT OF ACQUITTAL IN THE CRIMINAL ACTION AGAINST THE WASHINGTON BOARD AND NATIONAL ASSOCIATION IS NOT RES JUDICATA AS TO THIS ACTION

In the court below the defense of res judicata was asserted and overruled,[33] and it is again urged here in support of the decision below. The defense was based upon a judgment of acquittal in a criminal action against the Washington Board and National Association involving the same facts involved in the present action (Fng. 22, R. 435). We think that ruling correctly applied long-established principles to the facts of the present case.

It has uniformly been held that a verdict of acquittal in a criminal action is not a bar to a subsequent civil action involving the same defendants and the same facts (*Stone* v. *United States*, 167

[33] (Concl. 4, R. 436.) The district court had previously made the same ruling in denying a motion for summary judgment, and the court of appeals had dismissed an appeal for want of jurisdiction (Statement, *supra*, pp. 4–5).

U. S. 178; *Murphy* v. *United States*, 272 U. S. 630; *Helvering* v. *Mitchell*, 303 U. S. 391), except where the civil action is essentially punitive (*Coffey* v. *United States*, 116 U. S. 436). Perhaps the principal reason for this rule, and certainly a sufficient one to justify it, is the greater burden of proof resting upon the Government in a criminal case than in a civil case (see *Stone* v. *United States, supra*, at p. 188).

In *Helvering* v. *Mitchell, supra*, Mitchell had been tried and acquitted of a criminal charge of willful attempt to evade payment of his income tax. In a subsequent civil suit by the Commissioner of Internal Revenue to collect taxes owed and a 50 percent penalty for fraudulent evasion, Mitchell asserted that the acquittal in the criminal case was a bar to the collection of the penalty. In rejecting this defense the Court relied primarily upon the differences in burden of proof and stated (303 U. S. at 397–8):

> The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis* v. *Frick*, 233 U. S. 291, 302. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its

> nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone* v. *United States*, 167 U. S. 178, 188; *Murphy* v. *United States*, 272 U. S. 630, 631, 632. Compare *Chantangco* v. *Abaroa*, 218 U. S. 476, 481, 482.

The Court also recognized important procedural differences between civil and criminal actions which may frequently cause a different result on the same underlying facts. The Court stated (303 U. S. at 402):

> Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury, or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, the defendant has no constitutional right to be confronted with the witnesses against him, or to refuse to testify; and finally, in the civil enforcement of a reme-

dial sanction there can be no double jeopardy.[34]

It must also be noted that tools of discovery available in civil actions are lacking in criminal actions. In this category are interrogatories (F. R. C. P., Rule 33); requests to admit (Rule 36) and depositions (Rules 30, 31). Similarly, the Government may call hostile witnesses in civil proceedings and examine them as if on cross examination (Rule 43b). This privilege does not, of course, obtain in criminal actions.

Finally, the distinction as to right of appeal which was noted in the *Mitchell* case is of practical importance. Any errors in the course of a criminal trial culminating in an acquittal are beyond correction. It would be a perversion of the principles of res judicata to say in such circumstances that the Government has had its day in court and that the acquittal has settled the points of law and fact involved for all purposes. See *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 800–803; *cf. Johnson Co.* v. *Wharton*, 152 U. S. 252.

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[34] Civil antitrust actions are plainly remedial in nature and so far as our research reveals, there has never been a successful attempt to assert a verdict of acquittal in a criminal antitrust action as res judicata in a subsequent civil antitrust suit. *Cf. United States* v. *Warner Bros. Pictures, Inc.*, 13 F. Supp. 614 (E. D. Mo.), affirmed *per curiam*, 298 U. S. 643; *United States* v. *U. S. Gypsum Co.*, 51 F. Supp. 613 (D. D. C.).

It is settled law that the civil and criminal remedies under the Sherman Act are independent and that the Government may seek either without resorting to the other first. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 52. If the contention were to prevail that an acquittal in a criminal case may be res judicata in a civil case, this privilege would, as a practical matter, be destroyed. In order to have the full benefit of the procedural flexibility and right of appeal accorded in a civil suit, the United States would be compelled in each case to bring its civil suit first. There is no statutory or policy justification for such a requirement.

The present case falls squarely within the rules above reviewed. A comparison of the procedure followed in the two actions here—criminal and civil—serves as a graphic illustration of the differences commented upon in the Court's opinion in *Helvering* v. *Mitchell, supra.* In the criminal case a number of exhibits offered by the Government were excluded; and the judgment of acquittal permitted no appeal.[35] In the instant action the greater latitude in admitting evidence in civil cases resulted in the admission of 16 of the exhibits excluded in the criminal case (R. 335–336).

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[35] See 18 U. S. C. 3731. Cf. *United States* v. *Waters*, 175 F. 2d 340 (C. A. D. C.).

In the criminal case the judgment of acquittal represents only the conclusion of the trial court that upon the evidence presented a reasonable mind could not infer guilt beyond a reasonable doubt. See *Curley* v. *United States*, 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837. The judgment of acquittal is essentially similar to a verdict of acquittal by a jury, namely, that the Government's case had not been proven beyond a reasonable doubt. The fact that the judge, rather than the jury, made such a determination is immaterial here. The crucial circumstance is that the standard of proof necessary in the criminal case (guilt beyond a reasonable doubt), whether applied by judge or jury, is fundamentally different from the applicable standard of proof in a civil proceeding (preponderance of evidence).

In the court below appellees unsuccessfully attempted to distinguish the judgment of acquittal in the criminal case from the ordinary acquittal which would not be res judicata. The attempted distinction was based on the peculiar form of their motion for judgment of acquittal at the close of the Government's case in the trial of the criminal action. The motion was made pursuant to Rule 29 of the Federal Rules of Criminal Procedure as follows (R. 326–327):

> The National Association of Real Estate Boards moves for a judgment of acquittal

on the ground that no substantial evidence has been adduced against the said defendant upon which a reasonable mind could infer guilt beyond a reasonable doubt.

The National Association of Real Estate Boards makes the same Motion on the ground there has been no showing of any violation of the Sherman Act. In this aspect the motion is in the nature of a demurrer to the evidence.[36]

Appellees have contended that the effect of the granting of the above motion was to determine that the indictment did not state an offense under the Sherman Act. But their motion did not seek such a ruling. Had appellees wished to challenge the indictment, the method of doing so was a motion under Rule 12 to dismiss the indictment. It seems clear that appellees elected to make their motion under Rule 29 so that the resulting order would be a factual determination of the sufficiency of the Government's evidence which would not be appealable. Having succeeded in securing such a factual determination, appellees understandably would like to convert it into a determination of law that the facts stated in the indictment did not amount to an offense under the Act. To do this it would be necessary, however, to show (1) that a motion for a judg-

[36] Appellee Washington Board adopted the motion of the National Association (R. 305).

ment of acquittal under Rule 29 does, in law, raise the issues properly raised by a motion to dismiss the indictment—that is, the sufficiency of the indictment to charge a violation of law, assuming the truth of all facts charged therein; and (2) that the criminal trial judge did treat as true all the facts stated in the indictment.

The only issue that was open for decision by the criminal trial judge was the sufficiency of the evidence to prove the facts charged. So much of Rule 29 as is pertinent follows;

> (a) * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed *if the evidence is insufficient to sustain a conviction of such offense or offenses.* [Emphasis supplied.]

For res judicata purposes, "the significance of what a court says it decides is controlled by the issues that were open for decision," *Angel* v. *Bullington*, 330 U. S. 183, 187.[37]

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[37] In the court below appellees argued that their motion for a judgment of acquittal was in the nature of a demurrer to the evidence at common law, and then argued that such a demurrer assumes as true the facts alleged in the indictment. Cf. *United States* v. *U. S. Gypsum Co.*, 51 F. Supp. 613, 615–639 (concurring opinion by Judge Stephens). Although we think it clear that Rule 29 does not authorize such a procedure, appellees' position would not be advanced if the Rule in terms permitted a demurrer to the evidence. The purpose of the common law demurrer to the evidence was to test the legal

Quite apart from the fact that Rule 29 does not authorize a challenge to the *indictment* but only to the *evidence* offered, it is clear that the criminal trial judge had no thought that he was passing upon the sufficiency of the indictment. At no time while the case was before the court in the criminal trial did the appellees take the position that they were seeking a ruling on the facts as *charged* rather than the facts shown by the Government's evidence. Never did they advise the court that they would later claim that it had been asked to rule on the indictment. And even a casual comparison of the indictment with the criminal trial judge's opinion shows conclusively that he did not consider as true all the facts charged in the indictment. In the opinion of the court in the criminal trial is found this paragraph (R. 307):

> *The facts of the matter are* that the defendants, who are real estate men, have

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sufficiency of the evidence adduced to prove the facts alleged in civil actions; its purpose was not to determine the sufficiency as a matter of law of the facts set forth in the complaint. This Court, in *Galloway* v. *United States*, 319 U. S. 372, 400, described a demurrer to the evidence as a procedure under which "the defendant at the end of the trial admitted all facts *shown* by the plaintiff as well as all inferences which might be drawn from the facts, and asked for a ruling of the Court on the 'law of the case'" [Emphasis supplied]. And see *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 389, 400; Freeman, *Judgments* (5th ed. 1925) sec. 742; McBaine, *Trial Practice: Directed Verdicts: Federal Rule*, 31 Calif. L. R. 454; cf. *Tatcher* v. *United States*, 107 F. 2d 316 (C. A. 3).

> entered into voluntary associations for the purpose of bettering the conduct of their business, and after entering such associations *they still continue their individual businesses in full competition with each other,* * * * [Emphasis supplied.]

Again, it is stated (R. 308–309):

> * * * *where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain commerce,* but that it was entered into with the object of properly and fairly regulating the transactions of the business in which the parties to the agreement were engaged, such agreements will be upheld, in my view, as not within the statute; * * * [Emphasis supplied.]
>
> * * * * *
>
> *It is common knowledge, that competition between real estate brokers is in fact strong,* and success in getting the business depends not upon offering to transact for less than the uniform rate but upon the skill and facilities possessed for obtaining the highest price for the property from the purchasers. [Emphasis supplied.]

It is noteworthy that in each of these statements the court refers to facts. These facts were most earnestly disputed in the criminal case. Paragraph 26 of the indictment (R. 319) charged:

> The aforesaid combination and conspiracy * * * have had, *as intended by the defendants,* the following effects: *

(a) Competition between members of the the defendants in determining fees * * * has been eliminated.

* * * * * *

(c) The activities and business policies of real estate brokers * * * have been actively and effectively restricted and dominated. [Emphasis supplied.]

These quotations show that: (1) the criminal trial judge did weigh the evidence, and (2) he did not assume the truth of all the facts charged in arriving at his judgment of acquittal. He did not, directly or indirectly, rule on the sufficiency of the indictment. The word "indictment" was not even mentioned in the opinion save in the opening sentence describing the case before the court as brought "in the form of an indictment" (R. 306).

In light of the foregoing, it is evident that the judgment of acquittal in the criminal case represents only the decision of the court that the Government had not proved the criminal offense charged. And it is settled by *Helvering* v. *Mitchell, supra,* and the other cases cited (*supra* pp. 62–63) that such a decision is not res judicata in a subsequent civil action.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment should be reversed with directions that relief be granted the United States as prayed in the complaint.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 428 428

THE UNITED STATES OF AMERICA,
Appellant,

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SEPARATE BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF REAL ESTATE BOARDS AND HERBERT U. NELSON.

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February 3, 1950.

INDEX

Subject Index

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Counter-statement of the case	2
Argument	4
Introduction	4
Code of Ethics	8
NAREB'S Committee on Rates, Rules and Customs and Its Guide	16
Conclusion	28

Citations

Appalachian Coals, Inc. v. *United States*, 288 U. S. 344 (1933)	22
Associated Press v. *United States*, 326 U. S. 1 (1945)	10
Dahlgren v. *Story*, 39 App. D. C. 29 (1912)	11
Forrest v. *Wardman*, 40 App. D. C. 520 (1913)	11
United States v. *Line Material Co.*, 333 U. S. 287 (1948)	27
United States v. *Masonite Corp.*, 316 U. S. 265 (1942)	27
United States v. *Yellow Cab Company*, 94 L. Ed. (Adv.) 123 U. S. 1949)	5, 6, 22
Expediting Act, 32 Stat. 823, 62 Stat. 869, 15 U.S.C. 29	2
Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.*	2, 4, 5, 7, 8, 10
Federal Rule of Civil Procedure 52	5
Webster's New International Dictionary (2d Ed.)	14

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OPINION BELOW

The opinion of the United States District Court for the District of Columbia (R. 437) is reported in 84 F. Supp. 863.

JURISDICTION

The final judgment of the District Court was entered on July 29, 1949 (R. 436). The petition for appeal was filed and allowed on September 23, 1949 (R. 440-441). The jurisdiction of this Court is conferred by Section 2 of the

Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on November 21, 1949 (R. 629).

QUESTIONS PRESENTED

The principal question presented by this appeal, from the point of view of these Appellees is not mentioned in Appellant's statement of the questions presented. That question, to which this separate brief on behalf of Appellees National Association of Real Estate Boards and Herbert U. Nelson is directed, is whether the Trial Court's Finding of Fact No. 20 is *clearly erroneous*. That finding states that:

> "Neither the Defendant National Association of Real Estate Boards nor the Defendant Herbert U. Nelson conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia."

Unless that finding is clearly erroneous, the judgment must be affirmed with respect to the Appellees National Association of Real Estate Boards and Herbert U. Nelson, hereafter sometimes referred to as "NAREB", irrespective of what disposition this Court makes of the questions discussed in the joint brief of all Appellees.

COUNTER-STATEMENT OF THE CASE

The statement of the case in Appellant's brief requires, for the purpose of the question discussed in this separate brief, the following observations and corrections:

It might be more accurately stated that the complaint charged Appellees with engaging in a combination and conspiracy in violation of Section 3 of the Sherman Act

to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property and the improvements thereon (R. 367) rather than one to fix commission rates to be charged by members of the Washington Board for their services, as Appellant suggests at page 3 of its brief. The significance of this error of the Appellant in interpreting the meaning of the complaint is discussed in the joint brief of Appellees.

The District Court on July 29, 1949, filed the following findings of fact with respect to Appellees, National Association of Real Estate Boards and Herbert U. Nelson (R. 434):

> "18. The Defendant National Association of Real Estate Boards is a nation-wide, incorporated, trade association of which the Washington Real Estate Board is a member. Active members of the Washington Real Estate Board are likewise members of the National Association.
>
> "19. Defendant Herbert U. Nelson is the Executive Vice-President of the National Association of Real Estate Boards.
>
> "20. Neither the Defendant National Association of Real Estate Boards nor the Defendant Herbert U. Nelson conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia."

The section of Appellant's statement of the case entitled "The Participation of the National Association and Herbert U. Nelson in the Activities of the Washington Board" is factually incomplete. It includes references to but a part of the evidence material to the question raised by this separate brief. In many instances quotations from documents are taken out of context. Other important

evidence is omitted. Exception is taken to this portion of the statement of the case of Appellant. Inasmuch as this separate brief is essentially a discussion of the evidence which supports the above quoted findings of the District Court, a duplicate statement of that evidence will not be incorporated into this counter-statement of the case, but will be pointed out and discussed in the argument.

ARGUMENT

Introduction

The Appellant has characterized the complaint as charging Appellees "with engaging in a combination and conspiracy in violation of Section 3 of the Sherman Act to fix the commission rates to be charged by the members of the Washington Board for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia."[1] In its Finding of Fact No. 20, the District Court found that, "Neither the Defendant National Association of Real Estate Boards nor the Defendant Herbert U. Nelson conspired with the Washington Real Estate Board, to fix and prescribe the rates and commission to be charged by members of the latter nor to raise rates of commission in the District of Columbia." Unless this finding of fact be set aside this Court will affirm the decision below with respect to Appellees National Association of Real Estate Boards and Herbert U. Nelson, irrespective of what disposition is made with respect to the other Appellees.

[1] Appellant's brief, p. 3. For the purposes of this argument this characterization of the complaint will be taken as correct, inasmuch as that is the most favorable interpretation of the complaint for the Appellant and, as is discussed in the joint brief of all Appellees, the Appellant cannot prevail in any event unless this Court adopts its characterization of the complaint, as it must be conceded that there is no evidence of any restraint in the sale or exchange of real property to be found anywhere in the record.

In suits in equity brought by the United States under the Sherman Act, whether a finding of fact shall be set aside by this Court is governed by Federal Rule of Civil Procedure 52; *United States* v. *Yellow Cab Company*, 94 L. Ed. (Adv.) 123, (U. S. 1949). The applicable provisions of Federal Rule of Civil Procedure 52 are:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."

In *United States* v. *Yellow Cab Company*, *supra*, 94 L. Ed. (Adv.) at 126, this Court stated:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those of other litigants. There is no exception which permits it, even in an anti-trust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight is not 'clearly erroneous'."

As in the *Yellow Cab* Case, *supra*, the crux of this case with respect to NAREB was intent and purpose. At the conclusion of the trial, counsel for Appellant stated to the trial court (R. 304):

> "In conclusion, if your Honor please, I want to say once more with the exception of the intent and purpose of the Committee on Rates, Rules and Customs [of NAREB], with that exception I don't think that Brother

> Whiteford [counsel for NAREB] and I have any dispute about the facts in this case."

A review of all the evidence with respect to NAREB will reveal that, as in the *Yellow Cab* Case, *supra*, intent, motive and design are deciding factors. The Government again is asking that this Court try the case *de novo* on the record and reject the findings of the trial court.

The burden is, therefore, upon the Appellant to show that Finding of Fact No. 20 is clearly erroneous. This, Appellant has attempted to do in its brief in two major ways. First, by the contention that that finding does not mean what it says, and, secondly, by a discussion of the evidence which Appellant contends would lead a court to a contrary finding. The first contention is twofold. Appellant asserts that the trial court in a colloquy with counsel indicated that it felt that NAREB encouraged or incited the Washington Board to do the things which the Washington Board did. This, Appellant suggests, supports its second theory that Finding of Fact No. 20 is merely another way of stating that the activities of the Washington Board were legal (Appellant's brief, pp. 42-43). Neither of the two aspects of this argument are sound.

On page 37 of its brief Appellant quotes part of a sentence from a colloquy by the trial court to the effect that "Whatever the Washington Board did, the National encouraged or incited the Washington Board to do" (R. 341). The full paragraph from which the excerpt was quoted is set forth in footnote 11 on page 22 of Appellant's brief. That full paragraph indicates that what the Court was doing was asking counsel for NAREB whether such a statement of fact was the case. The most important part of such a colloquy is, therefore, that counsel's reply, and any further pertinent remarks of the Court, which were as follows (R. 341):

"Mr. WHITEFORD: No, sir. I make this distinction: That your Honor could hold that price-fixing for personal services by the local brokers in Washington could be illegal and could be a combination in restraint of trade, to which the NAREB would not be a party.

"The COURT: Even though the National Board encouraged the Washington Board to do what the Washington Board did?

"Mr. WHITEFORD: No, sir. I say we do not claim to have encouraged it at all."

Taken out of its full context, therefore, the excerpt from the trial court's remarks quoted on page 37 of the Appellant's brief is very misleading; in its context it turns out to be no "suggestion" at all. Reliance upon it can only emphasize the weakness of Appellant's case upon the evidence.

The suggestion on pages 42 and 43 of Appellant's brief that Finding of Fact No. 20 was merely a re-statement of a legal conclusion that what the Washington Board was doing was not a violation of law depended partially upon this misinterpretation of the excerpt from the trial court's colloquy on page 37 of that brief, and, therefore, almost falls of its own weight. Also, it converts a finding of fact into a conclusion of law. That the contention is untenable is likewise indicated by the wording of Finding of Fact No. 20, itself. That finding does not state, as Appellant would urge this Court to construe it, that the Appellees National Association of Real Estate Boards and Herbert U. Nelson did not conspire to violate Section 3 of the Sherman Act. It is a truly factual statement that they did not conspire with the other Appellees to "fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia" (R. 434). It is Appellant's contention that those were the *acts* which

violated Section 3 of the Sherman Act. The finding clearly says these Appellees did not conspire to do these acts.

Finding of Fact No. 20 is, moreover, a useless duplication if it is merely a re-statement that the Washington Board was not violating the Sherman Act. In discussing what findings to make, the Court made it clear that it would not stop with findings that the Washington Board and its members had not violated the Sherman Act, although that would dispose of the entire case, but would make additional findings with respect to the National Association (R. 352). Findings 18, 19 and 20 were, thereupon, made by the Court (R. 352-354, 434).

There is, therefore, no escape for Appellant from its burden of showing that Finding of Fact No. 20 is clearly erroneous. Appellant on page 41 of its brief contends:

> "In sum, the National Association and Appellee Nelson are shown by this record to have encouraged the rate-setting activities of the Washington Board (1) by requiring the members of the National Association in the District of Columbia as a condition of membership to agree that the rates established by the Washington Board should be observed, and (2) by giving detailed assistance to the Washington Board in formulating the rates which it prescribes."

A detailed study of the evidence with respect to these two points does not establish that Finding of Fact No. 20 is clearly erroneous, but rather indicates that such a finding is not only amply supported by the evidence, but is compelled by it.

Code of Ethics

Appellant says (Br. p. 40) "We submit that the Government is entitled to judgment against the National Association on the basis of its *by-laws and Code of Ethics alone.*"

During the trial it was said (R. 173):

"You are alleging that the National Council, or the National Board, and the Local Board entered into a conspiracy. That's a pretty definite thing.

"Mr. KRAMER: No doubt about that.

"The COURT: It is a very definite thing.

"Now you have produced evidence to show what action the National Board took and the Local Board, but there has got to be some coming together somewhere, hasn't there?

"Mr. KRAMER: I am suggesting to your Honor that the coming together is by the agreement of each member of the Washington Board who is a member of the National Association, to be bound by the Code of Ethics of the National Association."

This argument of the Government is based upon the syllogism that among the 35 articles in the Code of Ethics of the National Association (Exhibit 6, R. 481-486) there is one article, No. 9, which states, "the schedules of fees established by the various Real Estate Boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor," while the by-laws of the National Association contained an Article III which states:

"CODE OF ETHICS

"Section 1. Each member Board shall adopt the Code of Ethics of the National Association as a part of its rules and regulations for violation of which disciplinary action may be taken.

"Sec. 2. Any member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its constituent members may, after due notice and opportunity for hearing, be expelled from membership in the National Association by the Board of Directors" (R. 502-503).

From this the Appellant claims, *quod erat demonstrandum*, that the National Board has agreed with the Washington

Board and its members to fix rates in the District of Columbia.

The Government would analogize this involved reasoning to the by-laws of the Associated Press, which provided some of the evidence to support the trial court's findings in favor of the Government which were affirmed by this Court in *Associated Press* v. *United States*, 326 U. S. 1 (1945). In that case the provisions of the by-laws relied on by the Government were clear. See 326 U. S. at 10-11 and especially footnote 6. There was no involved reasoning necessary, no question of ethics or what *should* be done to be *ethical*, but rather what *must* be done to become a member of the Associated Press, and what was in fact done. There was no strained interpretation necessary as to the meaning of those by-laws.

It should also be remembered that the business of substantially all members of the Associated Press was interstate commerce and so was clearly under the Sherman Act, while about 99 out of every 100 National Association members, that is members of local boards in the 48 states, are not engaged in interstate commerce. The Code of Ethics of the National Association is a general code for the entire country. Only in the District of Columbia could the Appellant claim that the sale of real property was a business which could be subject to the Sherman Act.[2] This case is, therefore, far removed factually from the *Associated Press* situation.

The Code of Ethics of the National Association is exactly what its name implies, a guide for professional conduct of a high type, just as are the Canon of Ethics of the American Bar Association. Be it remembered that this Code of Ethics (Ex. 6, R. 481-486) was written in 1924, several

[2] In fact, what this argument amounts to is that Article 9 of the Code of Ethics does not contain the words "except in the District of Columbia."

years before the Washington Board became a member of the National Association (R. 224). It was written at a time when real estate brokers were indulging in many sharp practices. For example, they were representing both vendor and vendee and charging commissions from both without the knowledge of either (R. 218). This was even true in the District of Columbia and considered ethical practice until the decisions of *Forrest* v. *Wardman*, 40 App. D. C. 520 (1913) and *Dahlgren* v. *Story*, 39 App. D. C. 29 (1912). Brokers were taking net listings and options on their clients' properties (R. 218) and making exorbitant profits by these fraudulent means. Decisions in the appellate courts of all the states of the Union show the trickery and fraud of real estate brokers in this period.

To remedy these evils a committee of real estate men and a college professor specializing in real property wrote the National Code of Ethics for the then some 10,000 brokers and real estate boards in various states of the Union, at that time not including the District of Columbia. Only a reading of this Code of Ethics in this setting can make clear its purposes. It endeavored to put the real estate brokerage business upon an ethically professional basis. In this code the brokers set forth a charter of idealism (R. 224). It is an instrument to be commended rather than condemned. If complied with by brokers, this code will raise their occupation from one of criticism and suspicion to one of commendation and integrity.

The record makes this clear. There is evidence that a member of the Washington Board "tried to observe them all [the articles of the Code of Ethics] because they referred to decent, honest conduct in your relation to customers, in relation to the public and in relation to your fellow brokers" (R. 282-283). There is other evidence that the Code of Ethics was designed to remedy abuses which developed in the real estate profession during the depression years such

as the "free lot racket" (R. 214) and that Article 9 of the Code of Ethics was specifically designed as an attempt to remedy the abuses of dealing in options and net listings (R. 218).

Why then was NAREB indicted and complained against because of this code? Why is Article 9 of this code anathema to the Government? It reads as follows (Ex. 6, R. 483):

> "The schedules of fees established by the various real estate boards are believed *to represent fair compensation* for services rendered in their communities and *should* be observed by every Realtor." (Emphasis supplied)

In view of the existing evils among real estate brokers this was sound advice. In other words, brokers were told by this article not to overcharge for their services, not to resort to devious practices to acquire out of a real estate transaction something more than fair compensation. They were told not to get hidden profits at the expense of their clients.

To single out Article 9 of this entire Code of Ethics, to disregard the remaining 34 articles, to omit any consideration of its preamble and its purpose and to strain for interpretations is to indulge in legal myopia. This Code of Ethics is divided into sections on professional relations which deal with the relationship of one real estate broker to another. In the section on "Relations to Clients" the very highest principles of integrity and fair dealing are encouraged. In the sections dealing with the relations to the public the very highest standards of public service are recommended. In Article 9 is found the suggestion as to fairness in compensation.

The preamble of the Code of Ethics of NAREB compares favorably with the preamble to the canons of professional ethics of the American Bar Association. Honesty and integrity and fair dealing are the watchwords of both. The

lawyers' canons of ethics impose similar duties and obligations upon the lawyer in his relation to the public, to his fellow practitioner and to his client as does NAREB'S Code of Ethics upon its members.

The canons of ethics dealing with fees of the lawyer, numbers 12 and 13, are comparable to Article 9 of NAREB'S Code. Canon 12 in part says:

> "In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a *schedule of minimum fees adopted by a Bar Association*, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fees." (Emphasis supplied.)

Again in Canon 13, we find:

> "A contract for a contingent fee where sanctioned by law should be reasonable under all the circumstances of the case."

Is there much difference between a "schedule of minimum fees adopted by a Bar Association" and a "schedule of fees established by the various real estate boards?" Is there too much difference between "fair compensation for services rendered in their communities" and a "fee . . . reasonable under all the circumstances of the case?" Is there too much difference between the schedule of reasonable compensation that "should be observed by every realtor" and the lawyer's contingent fee that "should be reasonable?"

Can anyone reasonably say that the words of the realtors' code or the words of the canons of ethics are to have different construction in intent, motive and design when in both instances they are intended to set up a standard of ethical performance? We urge the same credit for sincerity in ethical thinking and practice to the realtor that the lawyer gives to his own profession.

In the interpretation of the intent, motive and design and the meaning of the words in Article 9 of the Code of Ethics, it must be remembered that this code now applies to more than 40,000 real estate brokers in the United States and more than 1,000 real estate boards in every state in the Union. In the District of Columbia there is one board and there are only about 250 members in that board engaged in real estate activity in the District of Columbia (R. 30), while there are more than 3,000 persons licensed for real estate activity in the District of Columbia (R. 296). While it is true that the members of the Washington Real Estate Board perform a considerable volume of real estate services it must be remembered that more than 3,000 others who are non-members do likewise. How then can it be said that the mere ethical suggestion of fair compensation to NAREB'S own members in the District of Columbia can be such a substantial conspiracy as to restrain commerce in the sale, leasing and exchange of real estate in the District of Columbia? There is not the slightest evidence that anything that NAREB, or for that matter the Washington Board, has done has made the slightest impact on the real estate economy of the District of Columbia.

It is essential to the Appellant's syllogism that the word "should" in Article 9 of the Code of Ethics be construed as "must", so as to make the Code of Ethics mandatory. Otherwise it would be no violation of the by-laws not to follow Article 9 and the entire argument of the Government would collapse. One definition of the word "should" in Webster's New International Dictionary (2d Ed.), cited by Appellant, is:

> "3. *Should*, esp. when stressed, is also used to express moral obligation; as, you *should* be sorry. . . . Syn.—See OUGHT." *Id.* 2322.

It could not have been clearly erroneous for the trial court to construe Article 9 upon its face as merely advisory since

the most that Appellant could contend is that Article 9 is ambiguous and might be intended as mandatory.

There is in addition, evidence in the record to indicate that Article 9 has been considered and construed by those who promulgated and used it as merely advisory. Such was the testimony of Mr. Buchanan (R. 282), Mr. Nelson (R. 219), and Mr. Rush (R. 131-2). This non-mandatory interpretation of Article 9 is also borne out by evidence in the record that the National Association has never attempted to enforce Article 9 of the Code of Ethics with respect to the Washington Board (R. 102-103, 144, 225).

The greatest weakness of the syllogism urged by the Appellant, is that no one else had apparently thought of its intricate logic prior to this suit. This fact is illustrated by the following testimony of Mr. Beitzell of the Washington Board (R. 267-268):

> "Q. And you saw in the constitution of the National the provision that you were supposed to live by and abide by and conduct your affairs as a realtor in accordance with the constitution and with those ethics, isn't that true?
>
> "A. That is right.
>
> "Q. And those ethics pretty well cover your professional conduct as a realtor in dealing with the public?
>
> "A. That is right.
>
> "Q. Isn't that true?
>
> "A. Yes.
>
> "Q. What wasn't brought to your attention was this: Because that constitution contains a provision that you should abide by the ethics of the National, and because the National had a provision in its ethics, one out of about forty, to the effect that the commissions which had been established by the local Boards were considered fair and reasonable and you ought to adhere to them, now in view of the fact that those provisions are in there, let me ask you this question:
>
> "Did you ever consider that you were so bound by the ethics of the National Association that you had to ad

here to what was called a standard fee which had been established by your own local board so that you couldn't negotiate your own commission?

"A. No, sir. I do not.

"Q. And have you ever heard that, among the members of your own local, or among the members of the National Association, interpreted that way?

"A. Never." (R. 267-268.)

Considering all the evidence in the record, with respect to Article 9 of the Code of Ethics of the National Association, Appellant cannot establish the contention which it must make that Finding of Fact No. 20 (R. 434) is clearly erroneous.

NAREB'S Committee on Rates, Rules and Customs and Its Guide

The Government argues that it is entitled to judgment against NAREB because of the existence of a Committee, and the publication of a Guide, on Rates, Rules and Customs. Its brief on page 40 states:

> "If further evidence be needed, it is to be found in the activities of the National Association in preparing and distributing its 'Guide on Rates, Rules and Customs'."

The complaint charges NAREB with being engaged in a conspiracy "to restrain the trade and commerce of the District of Columbia in the sale . . . . of real property and the improvements thereon" (Par. 11, R. 367). The complaint charges that the means of accomplishing the restraint of trade as aforesaid was the establishment of a Committee on Rates, Rules and Customs, the *purpose* of which was to *raise brokerage commission rates and achieve uniformity in said rates throughout the United States including the District of Columbia* (Par. 14, R. 367). It further

charges that in accordance with the recommendation of the National Association, the Washington Board increased the rates established in its schedule of commission.

In a section of the Appellant's statement of the case (Appellant's Brief, pp. 15-22) Appellant set forth the evidence in the record which it claims would support a finding that these Appellees conspired with the Washington Board. That evidence, it is apparent from a cursory reading, is entirely circumstantial. Since the trial court found that there was no conspiracy between NAREB and the other Appellees this circumstantial evidence can hardly be urged as grounds for holding at the trial court's Finding of Fact No. 20 (R. 434) is clearly erroneous. This is doubly true when the evidence relied upon by Appellant is viewed in its full context and with respect to other evidence in the record upon the same subject.

First, Appellant points to paragraph 14 of the answer of the National Association (R. 375), as an admission that committees of the National Association had taken an active part in the formulation of *standards* of compensation through the activities of various committees on rates, rules and customs. As will be discussed later the formulation of definitions and standards upon which the duties of a realtor in his various activities may be accurately classified and determined is a far cry from the fixing of rates of commission in the District of Columbia. A reading of the rest of paragraph 14 indicates this to be the case. In that paragraph is the statement (R. 375), "it was the effort of the National Association to suggest *standards* of compensation for the various services performed by real estate brokers that were regarded as reasonable in order to prevent unfair practices, imposition, unfair dealing and fraud upon the buying, selling and investing public and to so inform the public so that it would have some knowledge of what seemed

to be fair *standards* of compensation to brokers for services performed with respect to real estate." (Emphasis supplied.) Thus, paragraph 14 is not evidence circumstantial or otherwise that the National Association conspired with the Washington Board and its members *to fix rates*.

Definitions of the various types of real estate broker services were far from uniform throughout the United States. The National Association was aware that large lending agencies, such as insurance companies, and including Federal Government agencies such as the Home Owner's Loan Corporation, had complained of these differences and the resultant confusions (R. 211-213). It was the purpose of the Committee on Rates, Rules and Customs of NAREB to bring some order out of this confusion of definitions (R. 213).

The extract from Government's Exhibit 38 (R. 584), a letter written in 1935 which is quoted on page 16 of Appellant's brief is consistent with a purpose to formulate standards and definitions alone. Appellant might also have referred, to show the purpose of the Committee; to another letter written by the same author during the same year which Appellant offered in evidence as its Exhibit 29 (R. 583-584). This indicates that the National Association was interested in uniformity of classification and standards rather than uniformity of the fee itself (R. 583). In that letter the following analogy was drawn (R. 584):

> "I believe one of the best things the American Institute of Architects ever did was to develop a uniform contract of employment setting forth what an architect is supposed to do, describing his responsibilities briefly and establishing the basis of his charges. While the architect is free to vary the percentages and charges in a given case, he uses the same standard uniform contract. The fact that there is a standard contract used throughout the country and the basis of fee established eliminates an endless amount of difficulties and troubles

which I am told they were subjected to years ago. It seems to me this case is very much in point with respect to our own problems."

Counsel for Appellant also offered in evidence (R. 163) an excerpt from its Exhibit 31 (R. 585-587) as follows:

> "In an effort to bring about more uniformity in *language, style, and basis of calculation* in Realtors' charges, this Committee was formed during the year under the Chairmanship of Robert R. Otis of Atlanta. This is a long-time effort but one which may yield us important results." (Emphasis supplied.)

Returning to Government Exhibit 30 (R. 584) it might be pointed out that that letter was to Mr. Luchs as a member of the National Association and of one of its committees, rather than as a representative of the Washington Board. The closing paragraph of that exhibit, immediately following the portion quoted by Appellant, states (R. 584-585):

> "I have heard from your Board of your experience in this matter in Washington and you have been recommended for appointment on this Committee. I hope that you will be willing to serve. Upon receipt of your acceptance of this appointment, we will keep you in touch with any developments of the Committee and the accountants who are working with Mr. Otis in this matter."

Let it always be remembered that prior to this date the Washington Board already had a schedule of rates of commissions. See the Complaint, par. 25 (R. 369-370) and testimony of Mr. Rush (R. 50-51). It is obvious that the National Association was attempting to profit by Mr. Luchs' experience in Washington, D. C. This is not evidence that it was attempting to encourage or incite the Washington Board or its members to do anything. There would be nothing illegal in any event in trying to

emulate the Washington Board since there is no question as to the legality of schedules of commission within the boundaries of the 48 states, wherein almost all the member boards of the National Association are located, since selling real property is not interstate commerce.

Moreover, a reading of the entire Government's Exhibit 30 (R. 584) also indicates that it is not a report of actual past occurrences but a suggestion of what *might* be done in the future. It is weak circumstantial evidence at best. The probative value of Exhibit 30 is further weakened by the fact that it was written almost eight years before the adoption by the Washington Board on February 16, 1943 of a new schedule of rates, Complaint, par. 21 (R. 369).

However, as corroborative evidence, Appellant relies upon a letter from the same author written in 1946 which was offered in evidence as Government's Exhibit 48 (R. 617-618). The paragraph quoted on page 16 of Appellant's brief is completely out of context, as is indicated by an earlier paragraph in the same letter which read (R. 617):

> "The task of this Committtee is to seek to bring increasing order out of the somewhat confused rules of our Member Boards with reference to fees, commissions, and charges for services. This can be done by seeking *uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of the charge.*" (Emphasis supplied).

In addition, with respect to the portion of Exhibit 48 (R. 618) quoted by the Government, it should be pointed out that the suggestion of member boards acting together to gain confidence and strength was made to a Mr. A. R. Saunders in Lansing, Michigan. The letter was not sent to the Washington Board (R. 220-221), and there is absolutely no evidence that such a suggestion was ever made to the Washington Board, or a member thereof.

The documentary evidence that the purpose of the Committee on Rates, Rules and Customs was not to fix fees but to standardize definitions is supported by the verbal testimony of Mr. Baker who was asked by Government Counsel as to his knowledge of the purposes of the Committee and who replied that its purpose was to deal with ethics and arbitration (R. 146). Upon further inquiry into the purpose of the Committee in drafting a Guide on Rates, Rules and Customs for distribution to member boards, Mr. Nelson testified (R. 233-234):

"By Mr. Kramer:

"Q. Now, Mr. Nelson, you testified that this Guide, Exhibit No. 47-A, was for the purpose of obtaining uniformity in the basis of charges. Isn't that your point, rather than an identity of charges?

"A. Uniformity of definitions so that people are talking about the same thing, so that an owner and a broker are talking about the same thing.

"Q. You say in Exhibit 48, the second paragraph, the last sentence:

'This can be done by seeking uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of charge.'

"A. Yes. May I explain the word 'basis'?

"Q. I wish you would.

"A. Take in appraising, for instance, there has long been a conflict on what the basis of the charge should be.

In some cases appraisers have said it should be a percentage of the valuation.

The best practice today, so far as I know, is not to make the appraisal fee contingent upon the valuation in any way, but rather to base the fee on the time employed and on the rating which a man puts on his own skill and what he is willing to work for.

So there you have a conflict on what we call the basis of what the charge should be.

You still find some appraisers who will appraise the property on a certain fixed percentage of the valuation.

Well, you have the same problem, I suppose, in law, and in many other businesses, that conflict, whether it should be contingent fee or whether it should be a fair fee based on competency and time employed. That is what I meant by 'basis.'

"Q. And the purpose in sending out the Guide, you say, is not to seek to affect the amount of fees, is that it?

"A. That is right. May I qualify that by saying that our function is informational and educational, and we want to make available to each board all of the information from a thousand real estate boards throughout the country, so that they may know what good practices and what different practices are.

We function like almost any other educational sort of institution. You can't say that all of the material issued by a college has no effect. It may have some effect, but its primary purpose is to let people know what the facts are."

The evidence, therefore, falls far short of indicating that the purpose of the Committee was to fix rates, fees or charges in the District of Columbia. On the other hand there is ample evidence in the record that the purpose, design, motive and intent of the National Association's Committee on Rates, Rules and Customs was to standardize basic definitions with respect to the services rendered by Realtors, in order to eliminate unethical practices and abuses in the industry. See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933). This Court will not permit a trial *de novo* on appeal with respect to such elements in an anti-trust case. *United States* v. *Yellow Cab Company*, 92 L. Ed. (Adv.) 123 (U. S. 1949).

Intent and purpose aside, however, Appellant urges (Br. pp. 18-20), as its final piece of evidence, that the National

Association sent a "Guide" on commission rates, rules and customs (Ex. 17-A, R. 545) to the Washington Board, and that this Guide was the cause of the change by the Washington Board of its schedule of commission rates in 1943 (Ex. 28, R. 578) and in 1944 (Ex. 25, R. 569). Appellant stresses circumstantial evidence that on two occasions in 1939, which was about four years before the schedules were changed, the Washington Board deferred action of a special "Commission Study Committee" of the local Board until recommendations of the National Association were received (Ex. 12, R. 518-519; Ex. 27, 577-578).

With respect to Exhibit 12 (R. 518-519) the non-quoted portion of the first sentence which Appellant sets forth at page 17 of its brief indicates that the only interest of the Washington Board in the National Guide which was to be issued was with respect to *classification* of services. The entire text of that sentence is (R. 519) "The various *types of services* rendered by members for which no fees have been established by the Board was also discussed and the suggestion made that in view of the fact that the National Committee had appointed a special committee on commission rates and rules a copy of its report might be obtained for the consideration of the Committee." (Emphasis supplied). It is apparent that the Washington Board wanted the National Guide in order to assist it in defining these types of services.

This is also indicated by the paragraph in Exhibit 27 (the other local Board minute relied upon) which stated (R. 577):

> "It was brought out during the discussion that the resolutions of the National Committee would only be in the shape of a guide and not an attempt to force the adoption of a nation-wide commission schedule."

Both of these Committee minutes moreover are but circumstantial evidence that the Washington Board's Committee did wait until they received the Guide from the National Association before drafting a changed schedule for the Washington Board. This was about four years before such a changed schedule was adopted, it must be remembered. There is, moreover, evidence in the record that the Washington Study Committee did not wait for the Guide from the National Association. Mr. Rush, secretary of the local board, testified as follows (R. 127):

> "The COURT: You or the Board, however, waited, as a matter of fact, before adopting the 5 percent on the first $50,000 until such time as you heard from the National Association in reference to this matter. That is a fact, isn't it?
>
> "The WITNESS: No, we never considered this. At one of the meetings that was held it was stated that this matter should be held up but, you see, your Honor, each year half of my board of directors change and all the officers and all new committees. Unless I dig out the Committee action of last year and put it over into the jacket for the pending year or the coming year's business, while we don't refer back to those things and I have no knowledge of us having referred back to this report."

When the Guide actually arrived the evidence is that it was not considered by the Washington Board. Mr. Rush stated (R. 125-126):

> "The COURT: Mr. Rush, is the only communication received by the Washington Real Estate Board from the National Association of Real Estate Boards in reference to a guide on rates, rules and customs and particularly directing your attention to rates, was that the only information received by you that it ought to be 5 percent on the first $100,000?
>
> "The WITNESS: Your Honor, I received that guide.
>
> "The COURT: This is prior now to the time you had

your meeting at which you approved the report of the committee adopting 5 percent on the first $50,000. In this communication that you received from the National Association of Real Estate Boards, my recollection was that they had suggested 5 percent on the first $100,000 and I am trying to find out if that was the only suggestion or report that you received in reference to that matter from the National Association.

"The WITNESS: I received two copies, according to Mr. Barnard's letter. What I did with them, sir, I can't recall because, after all, we already had our 5 percent overall for the District of Columbia and what the NATIONAL guide said——

"The COURT: What I am trying to find out is——

"Mr. WHITEFORD (Interposing:) That is on page 9, your Honor.

"The COURT: Page 9?

"Mr. WHITEFORD: Yes, at the top of the page.

"The COURT: It says here, 'all commissions shall be based on total values or sale prices of property and not on equities or partial payments. Commissions on the sale of improved or vacant property shall be not less than 5 percent on the first $100,000'.

Yours was 5 percent on the first $50,000?

"The WITNESS: Yes, sir.

"The COURT: So that the local Washington Board did not accept the suggestion made by the National Association of placing 5 percent on the first $100,00 ?

"The WITNESS: I doubt that they even considered it, sir. I don't recall that they considered it in any respect."

As evidence that the Guide was considered by the Washington Board the Appellant urges (Br. p. 20) that "the recommendations contained in the Guide and the changes adopted by the Washington Board in 1943, and in 1944, contain striking similarities." However, when Appellant attempts to point out these similarities (see its footnote 10 beginning on page 20) it can only find similarities in the

1944 language (Ex. 25, R. 569-574). It is very significant that this language is not contained in the 1943 revision (Ex. 28, R. 578-582) since it was prior to 1943 that the Appellant would have had the trial court believe the Washington Board's study committee waited for advice from the National Association. The absence of such similar language raises an inference that the study committee did not consider the National Guide prior to the 1943 revision. It was in 1943 that the boundary line was eliminated and the old rates were replaced. (Ex. 43, R. opposite 521; R. 71). The basic *rates* did not change appreciably in 1944, but merely some definitions of the basis for rates. It is, therefore, obvious that the NAREB Guide had no effect upon the Washington Board's "fixing" of rates.

Such similarity in *language* between the Guide and the 1944 schedule is not surprising. In a profession, or trade, technical definitions often become accepted throughout an industry. Moreover, this is not what the complaint charges. It charges a conspiracy to fix rates, the Appellant contends (Br. p. 3).

Appellant does claim (Br. p. 20) that the sample rates in the Guide and the new Washington Board rates were strikingly similar. The very example Appellant gives, *NAREB:* 5% on 1st $100,000, 3% on next $400,000 and 2% on the balance, as compared to, *Washington Board:* 5% on 1st $50,000 and 3% on balance, speaks for itself! Similar differences in rates between the Guide (Ex. 17-A, R. 537) and the 1943 and 1944 local schedules (Ex. 28, R. 578; Ex. 25, R. 569) abound.

With respect to leasing, for example, the Guide "suggests" 5% for first five years, 3% for next five years and 2% beyond (R. 540), while the 1943 Washington schedule adopted 2½% for first 21 years, 1% for next 21 years, ½% for next 21 years and ¼% for any period beyond for long

term business leases, adopted 5% for first year, and 2½% up to 21 years for shorter business leases (R. 579) and adopted for residential leases 5% for first year and 2½% thereafter (R. 580). The 1944 Washington schedule for long term leases remained unchanged from 1943 except to adopt 5% for first year (R. 570) while shorter business leases remained the same (R. 570-571), as did residential leases (R. 572). Similar examples of dissimilarity with respect to other types of services appear throughout. Any minor similarities are coincidental. The "striking similarity" which Appellant urges (Br. p. 20) fails to survive a comparative examination of the three documents.

Anticipating such a discovery, in fact, Appellant urges two decisions of this Court in support of the proposition that, "A combination which delegates to one of its members the power to fix a price *that all members agree to observe* is just as illegal as a combination that contemplates that all members will participate directly in the selection of particular prices." (Emphasis supplied.) The proposition, if established, would avail Appellant naught, inasmuch as Appellees National Association and Herbert U. Nelson never agreed to observe such "price", if compensation for personal service can be called a price. The two decisions cited, *United States v. Line Material Co.*, 333 U. S. 287 (1948) and *United States v. Masonite Corp.*, 316 U. S. 265 (1942) involved industrial combinations in which *all* parties either agreed to sell at the fixed price or agreed to allow others to sell their products at a fixed price. In the instant situation Appellees National Association and Herbert U. Nelson have never agreed to do anything. Moreover, they are not even competitors of the Washington Board or its members. They do not sell real estate anywhere, in fact.

It must be remembered that prior to February 16, 1943 there was a schedule of commissions in force with respect

to the Washington Board, Complaint par. 19, 20, 23 (R. 368-369), which was in effect at least as early as 1934 (R. 50-51) or 1931, Complaint par. 25 (R. 369), and apparently much earlier (R. 48, 50). It is clear also that the only effect which the National Guide had upon the Washington schedules was, perhaps, to suggest some wording concerning definitions in the 1944 version.

This is an outstanding weakness of the Government's case with respect to NAREB. The Government doubtless contends that it was illegal for the Washington Board to have a schedule of commissions in 1931 or 1934. The Guide sent by the National Association in 1941, ten years later, could have had no bearing on the initial decision of the Washington Board to have a schedule of commissions, whenever that occurred. A comparison of the sample schedule of commissions in the National Guide and the 1943 and 1944 Washington schedules proves conclusively that the National Association's Guide could have had no effect on the local board's decision as to the amount of the new commissions.[3] There is therefore, nothing to tie the National Association or Herbert U. Nelson into any conspiracy to fix rates in the District of Columbia. The Government's case with respect to NAREB falls of its own weight, regardless of whether the Washington Board violated the Sherman Act.[4]

CONCLUSION

An examination of the evidence in this case has indicated that there is ample evidence to support the trial court's Finding of Fact No. 20 (R. 434) and to establish that it is not

[3] This is further indicated by the testimony of Mr. Beitzell, an eye witness participant in the 1943 meeting, that the members of the Washington Board decided on the actual rate at an open meeting (R. 255) NAREB knew nothing of this vote (R. 225).

[4] In all seriousness, it may be questioned whether there would have been an appeal taken in this case were Appellees National Association of Real Estate Boards and Herbert U. Nelson the only defendants below.

clearly erroneous. In fact, the evidence indicates that the Government has failed to adduce any reliable evidence that the National Association of Real Estate Boards and Herbert U. Nelson, on the one hand, conspired with the Washington Real Estate Board and its members on the other, to fix and prescribe the rates of commission to be charged by members of the Washington Real Estate Board or to raise rates of commission in the District of Columbia. What evidence the Appellant urges is highly speculative and circumstantial, and is discredited by other evidence in the record. There is an absolute lack of any evidence, circumstantial or otherwise, in the record to prove that these Appellees conspired with anyone to restrain "the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property and the improvements thereon", which is actually the charge in the complaint. Complaint pars. 8, 9, 10, 11 (R. 366-367).

It is submitted that Finding of Fact No. 20 (R. 434) is supported by the evidence and is not clearly erroneous, and that on the basis of such finding the judgment below must be affirmed with respect to Appellees National Association of Real Estate Boards and Herbert U. Nelson, regardless of the disposition of this appeal with respect to the other Appellees.

Respectfully submitted,

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No. 428

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NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, WASHINGTON REAL ESTATE BOARD, et al., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF WASHINGTON REAL ESTATE BOARD AND INDIVIDUAL APPELLEES OTHER THAN HERBERT U. NELSON AND J. HAWLEY SMITH

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INDEX

		PAGE
SUMMARY OF ARGUMENT		1
ARGUMENT		2
I.	A. Ambiguity of Complaint	5
	B. Confusion Caused by Boundary Zone	8
	C. Effect of Abolishing Bounday Zone	12
	D. Right to Abolish Boundary Zone	13
	E. Right to Offer Personal Services at Standard Rates; Sec. 6 of the Clayton Act	15
	F. The *Hopkins* and *Anderson* Cases	20
	G. The *Per Se* Rule as to Price-Fixing	22
	H. Offering Price of Services in Schedule Was Non-Mandatory	24
	I. *Appalachian Coals* v. *U. S.* and *Apex Hosiery Co.* v. *Leader* are Nearest the Present Case	30
II.	The Doctrine of *Res Judicata* Bars the Present Suit	34
	A. Identity of parties	37
	B. Identity of cause of action and issues	38
	C. Finality of prior judgment	49
	D. The prior judgment was rendered in favor of these appellants or their privies	49
	E. The Mitchell Case exception to the *res judicata* doctrine is not here applicable	50
	F. No analogy to the Mitchell Case is here applicable	51
III.	Conclusion	58

TABLE OF CASES

Allen Bradley Co. v. Local Union, 325 U. S. 797 ..... 18, 19, 22

Allgeyer v. La., 165 U. S. 578 ..... 15, 17

PAGE

Amer. League Baseball Club v. Chase, 86 Misc. 441 21

Amer. Med. Assn. v. U. S., 130 F. 2d 233, 242 19

Amer. Med. Assn. v. U. S., 317 U. S. 519 19

Anderson v. U. S., 171 U. S. 604 ..... 20, 21

Apex Hosiery Co. v. Leader, 310 U. S. 469, 502, 503..... 15, 32-34

Appalachian Coals v. U. S., 288 U. S. 344 ..... 30, 32, 34

Armour & Co. v. Wantock, 323 U. S. 126 23

Atlantic Cleaners & Dyers, Inc. v. U. S., 286 U. S. 427.. 23, 24

Bakery Drivers v. Wohl, 315 U. S. 769 19

Baldwin v. Iowa State Traveling Men's Assn., 282 U. S. 522 35

Bennett v. Commissioner, 113 F. 2d 837 35

Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 127 57

Brown v. Brown, 74 App. D. C. 309, 122 F. 2d 219 35

Chicago Board of Trade v. U. S., 246 U. S. 231 34

Chicago, R. I. & P. R. Co. v. Schendel, 270 U. S. 611, 620, 53 A. L. R. 1265 38

Coffey v. U. S., 116 U. S. 436 ..... 36, 50

Commissioner v. Sunnen, 92 L. Ed. (Adv.) 673 35

Cromwell v. County of Sac, 94 U. S. 351 ..... 35, 38

Curley v. U. S., 81 U. S. App. D. C. 289, 392-3, 160 F. 2d 229 *cert. denied* 67 Sup. Ct. 51

Davis v. First Nat'l Bank, 139 Tex. 36, 161 S. W. 2d 467, 144 A. L. R. 1 57

Deposit Bank v. Frankfort, 191 U. S. 499 49

Drivers Union v. Lake Valley Co., 311 U. S. 91 19

Duplex Printing Press v. Deering, 254 F. S. 443 18

Eastern States Lumber Assn. v. U. S., 234 U. S. 600, 614 14

PAGE

Federal Baseball Club v. National League, 259 U. S. 200 21

Fox v. Johnson & Wimsatt, Inc., 127 F. 2d 729, 735 30

Gardella v. Chandler, 172 F. 2d 402, 406 ..... 18, 23

Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439 17

Griffin v. Long Island Ry., 102 N. Y. 449 49

Harelson v. Tyler, 281 Mo. 383 21

Hart v. Keith Vaudeville Exchange, 12 F. 2d 341 21

Hartford L. Ins. Co. v. Ibs., 237 U. S. 662 38

Helvering v. Mitchell, 303 U. S. 391 ..... 36-37, 50, 57

Hopkins v. U. S., 171 U. S. 578 ..... 18, 20, 21, 53

Hunt v. Riverside Corp. Club, 140 Mich. 538 21

Ingersoll v. Coram, 211 U. S. 335, 364 57

Johnson Co. v. Wharton, 152 U. S. 252 49

Litchfield v. Goodnow, 123 U. S. 549 57

Local 167 v. U. S., 291 U. S. 293 ..... 36, 50, 57

Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U. S. 219, 230 20

More v. Bennett, 140 Ill. 69, 29 N. E. 888 21

Morris v. Jones, 329 U. S. 545 35

Nalle v. Oyster, 36 App. D. C. 36, 1910, *affirmed with respect to the results of this holding* Nalle v. Oyster, 230 U. S. 165, 181, 1913 54

Nash v. U. S., 229 U. S. 373, 376 31

NLRB v. Hearst Publ., 322 U. S. 111 19

New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 19

Oklahoma v. Texas, 256 U. S. 70 38

People v. Gassman, 295 N. Y. 254; 66 N. E. (2) 705 ..... 19, 21

	PAGE
Post v. Bucks Stove & Range Co., 200 F. 918	21
Reed v. Allen, 286 U. S. 191	49
Ring v. Spina, 148 F. 2d 647	23
Sealfon v. U. S., 332 U. S. 575	35
Southern Pacific R. Co. v. U. S., 168 U. S. 1	35, 38
Sperry & Hutchinson Co. v. Fenster, 219 F. 755	21
Stafford v. Wallace, 258 U. S., 495, 523-524	20
Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20	56
State v. Duluth Board of Trade, 107 Minn. 506	21, 53
Stoll v. Gottlieb, 305 U. S. 165	53
Stone v. U. S., 167 U. S. 178	36
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 at 402	38
Town of Elgin v. Marshall, 106 U. S. 578	49
U. S. v. Borden Co., 308 U. S. 188	18
U. S. v. Hutcheson, 312 U. S. 219	15, 18, 19, 24
U. S. v. Line Material Co., 333 U. S. 287	23
U. S. v. Maryland Virginia Milk Producers Assn., 93 L. Ed. (Adv.) 15	54, 55
U. S. v. Moser, 266 U. S. 236	53
U. S. v. Oppenheimer, 242 U. S. 85, 3 A. L. R. 516	36, 53
U. S. v. Paramount Pictures, Inc., 334 U. S. 131	23
U. S. v. Salen, 244 Fed. 296, 298-9	36
U. S. v. Socony Vacuum Oil Co., 310 U. S. 150	7, 19, 22, 23
U. S. v. South Eastern Underwriters Assn., 322 U. S. 533	23
U. S. v. Swift & Co., 318 U. S. 442 at 444	54
U. S. v. Trans Missouri Freight Assn., 166 U. S. 290	23
U. S. v. United States Gypsum Co., 51 F. Supp. 613, 615, 616	35, 37, 51

PAGE

U. S. v. Warner Bros. Pictures, 13 F. Supp. 614, 615-6 ... 36
U. S. v. Waters, 175 F. 2d 340 C. A. D. C. 1948 ... 49, 54
U. S. v. Wayne Pump Co., 317 U. S. 200 at 204-6 ... 54
U. S. v. Yellow Cab Co., 94 L. Ed. Adv. 123 ... 30, 32
Washington & Georgetown R. Co. v. D. C., 146 U. S. 227 ... 49
Wickard v. Filburn, 317 U. S. 111, 121-122, Note 20 ... 20

STATUTES

Clayton Act, Section 6 ... 4, 15, 16, 18, 19, 20, 24
Norris-LaGuardia Act ... 15, 19, 22
Sherman Act, Section 3 ... 5, 16, 18, 30-34, 38, 52, 53, 56-57
Taft-Hartley Act ... 15, 22
Wagner Act ... 15, 22

RULES OF PROCEDURE

Federal Rule of Criminal Procedure 29 ... 50, 54
Federal Rules of Criminal Procedure 33 & 36 ... 50
Federal Rule of Criminal Procedure 16 ... 57

TREATISES

30 Am. Jur., "Judgments", 165 ... 35
Berman, "Labor & the Sherman Act" ... 18
2 *Black on Judgments*, 2d Ed. 609, p. 924 ... 35
Bordin, Louis, "The Sherman Act & Labor Disputes", 39 Col. L. Rev. 1283, 40 Col. L. Rev. 14 ... 18, 20
Haines, "A Revival of Natural Law Concepts in State and Federal Judicial Decisions", p. 82, 83 ... 17
Frankfurter & Greene, "The Labor Injunction", Chap. I ... 22
Groat, "Attitude of Amer. Courts in Labor Cases", 42 Col. Univ. Studies, p. 39-58 ... 22
Teller, *Labor Disputes*, Section 190, p. 564; Section 60 ... 20, 22

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OPINIONS BELOW

The opinion below of Judge Holtzoff (R. 437) is reported in 84 F. Supp. 802. The opinion of Judge Curran in the criminal case, identical in material allegations with the Complaint herein, is reported in 80 F. Supp. 350 and may be found in the record herein at p. 306.

OUTLINE OF ARGUMENT

I.

The Government has made no showing the Findings of Fact made below are clearly erroneous.

From 1917 until 1943 commission rates on the sale, lease, etc. of real estate in the District of Columbia were based on a Boundary Zone, inside which rates were lower, outside which rates were higher. These rates were established by custom, practice and usage.

The testimony was they were "accepted by everybody, by the brokers, by the banks and by the courts themselves." The Government did not claim (See Compl. par. 19, R. 368) or prove the defendants had anything to do with fixing them.

The Boundary Zone went through Georgetown, Cleveland Park, Brookland and other sections which in the '20's and '30's became a vast residential and apartment house area as urban as downtown Washington. As time went on the Boundary Zone became more and more unrealistic and inequitable, causing complaints from owners and brokers alike.

In 1939 the Washington Board appointed a committee to study the problem but nothing was done until February 1943 when the members at a Special Meeting voted to abolish the Boundary Zone as a yard-stick and adopted a straight scale of commissions applicable everywhere in the District.

The Washington Board contends it had a right to remedy this situation and abolish the Boundary Zone so far as its members were concerned. As the Boundary Zone established a scale of rates the Washington Board was

compelled, upon its abolition, either to substitute a new scale or have no scale at all.

The Court below found the new schedule resulted in higher commissions in many instances and lower commissions in others. (Fng. 10, R. 434) The Court also made important Findings of Fact that the schedules of standard commissions were construed by the members as non-mandatory in character and as setting forth a basis upon which to estimate fair compensation for services performed. (Fng. 16, R. 434). The published rates were used in a great majority of instances, altho in many cases members departed from them and in exceptional cases a lower charge was made. (Fng. 11-12, R. 434)

The Court below also found that there is no proof the standard rate of commissions was unreasonable or unreasonably restrained competition between brokers or adversely affected the sale of real estate. (Fng. 13, R. 434)

The Government has made no serious showing that these findings are clearly erroneous but has cast its whole case upon the doctrine that rate-fixing like price fixing is always, *per se*, illegal. But, clearly, if these findings are not clearly erroneous there is no rate-fixing at all but only, as the Court below held, the publication of schedules of commissions, non-mandatory in character, setting forth a basis upon which to estimate fair compensation for services performed.

II.

The Court below found that the Schedule of Standard rates, embodied in the standard contract presented to the principal, consists of an offer by the broker to perform personal services at the rate specified. (Fng. 17, R. 434) It is difficult to perceive rate-fixing when this offer, at most, is made by 250 realtors out of a total of 3525 real

estate agents licensed in the District. In any event rate-fixing for personal services is obviously only wage-fixing, here fixing an offering price. Section 6 of the Clayton Act, in stating that "The labor of a human being is not a commodity or article of commerce" announces a broad public policy which up to now has been respected by the Government which has never prosecuted workers who either singly, or united with others without contact with outside groups, have attempted to improve their lot. The right of a worker, even a white-collar worker, to offer to work for whatever he sees fit, and even to unite with his fellows in making such offers, is a natural right, and in no way a boon conferred by the State. The holding of the Court below that Sec. 6 of the Clayton Act excludes personal services and wage-fixing (here *offers* to work at given rates), and that the Sherman Act has never been construed to apply to such activities, is essentially sound and indeed necessary to prevent us committing ourselves, unwittingly, to one of the concepts of the totalitarian state.

III.

The judgment of acquittal in the criminal case, in which the indictment was word-for-word identical with the Complaint herein, operated as *res judicata* of the present Complaint. The acquittal resulted from defendants' motion for judgment made at the close of the Government's case, which in effect stated to the Court "assuming the facts charged are proved, still there was no violation of the Sherman Act." As the Government has but one complaint against defendants, which it casts, at its option, in criminal or civil form, and as the two actions are identical in their charges, no reason appears why when it elects to try the criminal case first, acquittal in that case should not bar the other. No question of proof beyond a reasonable doubt is involved.

IV.

THE SCHEDULE OF STANDARD COMMISSIONS ADOPTED FEBRUARY 16, 1943, DID NOT CONSTITUTE ILLEGAL PRICE-FIXING

A. Ambiguity of Complaint:

The Complaint charges that defendants engaged in a "conspiracy to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property."[1] (Compl. par. 11, R. 367) Rate-fixing is charged as the means by which this was to be accomplished. (See Compl. par. 12, R. 367) The first question is whether the conspiracy refers (1) to restraint of the sale, lease, etc., by a *principal* of his own real property or (2) to restraint of the business of running a real estate office, operating as a broker, etc. The distinction is important because if the former, (1) above, the Government must prove that an alleged agreement to fix brokers' rates would, or could, operate as a restraint upon an owner in selling, leasing, etc., his own real estate. The question was specifically put in issue by the Washington Board's Third, Fourth and Seventh defenses. (R. 390-1).

After two trials and two written opinions by two District Judges, defendants are still in the dark as to which theory is invoked.

To illustrate the confusion, Judge Curran in his opinion dismissing the criminal case starts out with the inquiry, "Is the business of the defendants interstate (sic)[2] commerce in the sense of that word as it has been used and understood in the decisions of the courts?" After de-

---

[1] The Indictment makes the same charge, word for word. (Ind. par. 9, R. 314.)

[2] Judge Curran uses the phrase "interstate commerce", but evidently meant commerce in the District of Columbia, deemed "interstate" in a sense, under Sec. 3 of the Sherman Act.

veloping the point that the personal services of real estate brokers are mere aids of facilities to commerce, Judge Curran considers "their effect *in the sale of real estate*," and goes on to hold that such charges for services "do not immediately touch upon or act upon, nor do they directly affect the *sale of real estate* in the District of Columbia." (R. 307) The Court continues:

> "Of course, indirectly and as an incident they may enhance the cost of the *owner of real estate*, or they may add to the price paid by the purchaser, but they are not, in my opinion, charges which are directly laid upon *real estate* itself. Rather, are they charges for facilities given or provided to clients in the course of the *sale of real estate*.
>
> "Here in this case the conspiracy condemned by the statute is one whose direct and immediate effect is a restraint upon trade or commerce in the District of Columbia. As I say, charges for such facilities, in my opinion, are not restraints upon the trade or commerce, although, as I have indicated, the total cost of *selling the real estate* may be increased.
>
> "The right of the *owners of real estate* in the District of Columbia to sell their own property in any way whatever is not affected or touched by the agreement in question, while the privilege of *having their property sold for the real owner*, with the aid of a broker, is a privilege which they are charged for and which is not attached to their right to sell their own property." (R. 308). (Italics ours)

The above and the remainder of Judge Curran's opinion at R. 308 shows clearly that he was of the opinion that the charge was a conspiracy to restrain *owners* in the sale, lease, etc. of real estate.

It may well be questioned whether Judge Curran's opinion does not establish the law of the case which bound the court in the civil case, bearing in mind that the Complaint repeats word for word the charge of the Indictment. After all, the Government has but one grievance against defendants which took the form of a criminal in-

dictment and a civil complaint. The construction given the Indictment ought, on general principles, to govern the Complaint, the two being identical in their allegations.

The opinion of Judge Holtzoff in the civil case states at the outset that "The Government contends that the defendants have combined to fix real estate brokerage commissions" (R. 438) This is not necessarily inconsistent with the basic charge "of a conspiracy to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property," (Compl. par. 11, R. 367) bearing in mind that rate fixing is charged as the *means* (Compl. par. 12, R. 367). Later in his opinion Judge Holtzoff holds that there is no evidence showing the standard rate of commissions was unreasonable or excessive or "that this activity unduly or unreasonably restrains competition as between brokers or adversely affects the *sales of real property.*" (R. 438, Italics ours). This appears to adopt the latter or both theories.

Judge Holtzoff likewise found that there was no proof that the standard rate of commissions "unreasonably restrains competition between brokers or *adversely affects the sale of real estate.*" (Fng. 13, R. 434, Italics ours.) Also, the court below in its conclusions of law stated that publishing a standard rate of commissions does not alone, of itself, create an unreasonable restraint of trade in the absence of showing that such rates were unreasonable or oppressive in themselves or that they result in substantial diminution of competition or otherwise create an unreasonable restraint of trade or commerce. As Judge Holtzoff was aware of the frequent quotation from *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 to the effect that price fixing is always illegal *per se*, (See Judge Holtzoff's Op. R. 439), the indication is that he, too, felt the primary charge involved a restraint of owners, in which event rate fixing of brokers would involve merely a secondary re-

straint in respect of a *facility* as to which the rule of reason would apply.

The two opinions below show the difficulty of applying the Sherman Act to the facts of this case and the novelty of the litigation. As will be shown later in the present Brief, p. 15-24, the Anti-trust Acts have never, up to the present, been applied to personal services of the kind herein involved.

B. Confusion Caused by Boundary Zone:

When the Washington Board was organized in 1928, it found real estate commissions in the District were based on an artificial Boundary Line dividing downtown Washington from the outlying area. The Washington Board did not establish the Boundary Zone; it was established in 1917 by custom, practice and usage. (R. 285-287) and, as one witness put it, "was accepted by everybody, by the brokers, by the banks and by the courts themselves." (R. 287)

The commission on sales in the inner zone, downtown, was 5% on the first $5,000 and 3%, above. In the outer zone, beyond the Boundary Line, it was a straight 5%. (R. 110-113; 284-287) The larger commission for the outlying area went back to the horse and buggy days, when it took more time to take a prospect out to view the suburban property. (R. 286).[1]

As time passed, from 1917 on, the Boundary Zone be-

[1] The testimony refers to a Schedule of Standard Commissions around 1931, Gov. Ex. for identification 14, which was excluded on the Government's statement (R. 49) that it would not go back beyond 1940 and was withdrawn (R. 521). Ex. 13, R. 520, shows a 5% and 3% scale in 1934. It seems clear the Schedule of Standard Commissions adopted February 16, 1943 is what the Government now complains of. (See Compl. par. 19, R. 368, Gov. Brief p. 7-9; 29-31; 39-43) Only on this theory could the Government, under any conceivable circumstances, involve the National Association.

came more and more artificial and unrealistic. Sections of the city now as built-up as 14th and F Streets were outside the Boundary. As an instance, everything north of Cleveland Park and the large apartment house area around Wisconsin Avenue, north of Georgetown, was beyond the Boundary Line. Massachusetts Avenue at the Bridge over Rock Creek Park was in the suburban area; so, too, was all of Wesley Heights, Spring Valley, and the section surrounding the Westchester Apartments. The immense residential area known as Saul's Addition, commencing half a mile north of the Baseball Park and stretching to Silver Spring was suburban. The Section surrounding Catholic University was outside the Boundary Line and all of southeast Washington across the Bridge on Pennsylvania Avenue, S. E., or across the other bridge leading to the area around St. Elizabeth's Hospital. A map, Exhibit 13, at R. 520, shows the Boundary Zone.

With the advent of the cheap automobile the time element in taking prospects out to these areas disappeared. (R. 113, 286) The sale of an office building downtown, inside the zone, or an apartment house on Connecticut Avenue, outside the Zone, took about the same amount of time. (Ex. 20, R. 286, 553) Also, property owners just outside the line resented the lower rate for the sale of property just inside it. (Ex. 20, R. 255-256, 553) Most of the building, in the '30's, was beyond the Boundary Line. (R. 112) The worst feature of the Boundary Line was the confusion it caused (R. 112, 268-269, 284; Ex. 20, R. 552). The Boundary Line followed 38 different directions and, as one witness put it "was the biggest headache we had in the real estate business". (R. 268-269; Ex. 13, R. 520)

To meet the difficulties of the Boundary Zone a Special Commission Study Committee was appointed in the '30's (R. 46). The minutes of its meeting on February 10, 1939, shows that its primary purpose was to eliminate the two

commission zones (Ex. 12; R. 518-519).[1] Years passed without action. It is at this stage the Government, in its Brief, p. 17-22, claims the National Association entered the picture. We think the National Association has effectively disposed of this charge in its separate Brief herein. However, the plain facts are that on June 16, 1941, Mr. Charles J. Rush, Secretary of the Washington Board received a copy of a "guide on commission rates, rules and customs" from the National Board, (Ex. 17, R. 536). He put it in his desk and neither the Washington Board, nor any of its Committees ever considered it. (R. 127) As a matter of fact the Special Commission Study Committee did not meet during 1941 and 1942. (R. 59) It was not until almost two years later, on January 20, 1943, that the Directors of the Washington Board again took up the matter of the Boundary Zone. (R. 59, Ex. 18, R. 548) It is self evident that abolishing the Boundary Zone meant a change in rates, either in one place or the other. It is significant, however, that when the Directors took up the matter they considered rates entirely different from those contained in the National Associations' study. (Compare R. 548 with R. 544) The study contains countless recommendations never reflected in anything adopted by the Washington Board. (Compare Ex. 17a R. 537-545 with Ex. 28, R. 579-582).[2]

The minutes of the January 20, 1943, meeting above referred to states:

> "'Your Brokers' Committee, after due consideration, for the reasons cited below, respectfully suggests *the elimination of the boundary line distinguishing "suburban" and "city area"* insofar as payment of commission on the sale of real property is concerned." (R. 548, Italics ours)

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[1] Ex. 12 was excluded in the criminal case (R. 46) but admitted in the civil suit for such probative value as it might have. (R. 335).

[2] The alleged similarities claimed in the Government's Brief p. 20 seem plainly spurious. There is almost no similarity at all.

A special notice to all members dated January 22, 1943, (Ex. 19, R. 549) called a meeting for February 16, 1943, to consider the above. The minutes of that meeting show that the primary purpose was to eliminate the commission Boundary Zone. (See Ex. 20, R. 552-553) As the Boundary Zone prescribed rates, the only way to abolish the Boundary Zone was to change the rates, which the members did, exactly as recommended by their own committee and directors. (Ex. 18, R. 548; Ex. 20, R. 552-554).[1] The amended motion adopted by the members abolished the Boundary Zone and adjusted the commission rate to provide for a commission of 5% up to $50,000 and 3% on any excess above $50,000 for sales in the District of Columbia and the adjacent Metropolitan area. (R. 552, 554).[2] On February 17, 1943, the Secretary sent to all members a Special Bulletin (Ex. 21, R. 555) which commences:

> "*Placing the entire District of Columbia into one commission zone* was accomplished this week when members of the Washington Real Estate Board for-

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[1] It is no answer for the Government to claim that abolition of the Boundary Zone was changed into a straight rate-fixing agreement on the ground the rates were changed *upward*. The Government's theory of the case was that any change, upward or downward, even a reduction to 1%, would violate the Sherman Act. (See Statement of Government attorneys June 2, 1948, Tr. p. 727-8; 744; also statement at R. 179). Further there is no proof the change was upward. The Court found as a fact (Fng. 10, R. 433-4), that the revision resulted "in higher charges in many instances and lower commissions in other situations."

[2] The minutes recite a comparison with rates in other large cities:

"Philadelphia	5% straight—no ceiling.
St. Paul	5% straight—no ceiling.
Syracuse, N. Y.	5% straight—8% beyond 7 miles from center of city.
Chicago	5% to $100,000.—3% above.
Kansas City	5% to $100,000.—3% above.
Columbus, Ohio	5% to $100,000.—4% above.

'It will be noted that the suggested change, eliminates the theoretical boundary line but at the same time fixes the District of Columbia rate a great deal more favorable to the property owner than in any city above named.'" (R. 554)

mally agreed to the *elimination of the two commission boundary zones* which have been in existence for more than 20 years." (Italics ours)

No atmosphere of conspiracy surrounded the abolition of the Boundary Zone and the adoption of new rates in replacement. The Court below so held in its opinion (R. 438) and in its Findings of Fact found:

> "8. There is nothing clandestine or surreptitious about this activity of the Washington Board." (R. 433)

The Government concedes this in its Brief p. 6-7.

C. Effect of Abolishing the Boundary Zone:

The Court below made a Finding of Fact that on the abolition of the Boundary Zone February 16, 1943, the change in the commission rates resulted "in higher charges in many instances and lower commissions in other situations". (Fng. 10, R. 433; Op. R. 438). Thus prior to the abolition of the Boundary Zone an apartment house on Connecticut Avenue in Cleveland Park selling for $100,000 would result in a commission of $5,000. After abolition of the Boundary Zone in 1943 the commission would be $4,000. On the other hand, a store on F Street selling for the same price prior to the end of the Boundary Zone would involve a commission of $3,100, i. e. 5% on the first $5,000 and 3% on the excess. After the change of 1943, the commission would be $4,000, namely 5% on the first $50,000 and 3% on the excess.

The Court below found as a fact:

> "13. There is no proof that the standard rate of commissions published by the Washington Real Estate Board is unreasonable or that this activity unduly or unreasonably restrains competition between brokers, or *adversely affects the sale of real estate.*" (Fng. 13, R. 434, Italics ours).

In its Conclusions of Law the Court held:

> "1. The action of real estate brokers in publishing a standard rate of commissions charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act, in the absence of a showing that such rates were unreasonable or oppressive in themselves or that they result in a substantial diminution of competition or otherwise create an unreasonable restraint of trade or commerce. There is no such showing *or such a contention in this case.*" (Concl. of Law 1, R. 435, Italics ours)

D. Right to Abolish the Boundary Zone:

The evidence is uncontradicted that the Boundary Zone, which existed eleven years before the Washington Board was organized, was inequitable and a constant source of irritation to owners and brokers alike. The question now is: did the members of the Washington Board have the right to abolish it as a yard-stick in offering their services to the public? For that is what the Schedule of Standard Commissions of 1943 amounts to: it is a public notice to the effect that the members of the Board offer to perform services for principals at the rate set forth. (Fng. 17, R. 434) We will show later that the rate was non-mandatory and subject to mutual agreement. (See present Brief *infra*, P. 24). The Court below so held (Fng. 11, 16, R. 434).

It is difficult for us to believe at this late date that a group of men violate the Anti-trust Acts when they choose to rid themselves of an inequitable and archaic method of making charges for services inherited from an earlier generation. It is self-evident that in abolishing a Boundary Line which determines rates this side and the other side of it, brokers must substitute new rates or have no schedule at all. But this does not constitute illegal price fixing. It must be remembered that all the members have done is to agree among themselves to *offer* to perform personal serv-

ices at a standard rate (Fng. 17, R. 434)—an offer subject to bargaining and acceptance or rejection. The offer is made by a group of 250 realtors[1] out of 3,525 brokers licensed in the District. (R. 267) There can be no claim of monopoly or unreasonable restraint. (Fng. 12; Concl. of Law 1, R. 431-434) The owner, if he does not wish to pay the standard commission or strike a bargain, can obviously go elsewhere. The Government's suggestion in its Brief, p. 25, 56-57, that real estate brokers should go to Congress to get the Boundary Zone abolished or to tell them what price they should ask for our services can hardly be taken seriously.

Equally frivolous, we think, would be the stock contention that what brokers can do singly they cannot do as a group. (See *Eastern States Lumber Assn.* v. *U. S.*, 234 U. S. 600, 614.). The Boundary Zone was a trade practice which the Board took "as is" when it was organized. When it proved increasingly inequitable and unworkable the Board had the right to deal with it as a Board. It was fairly within the purposes for which the Board was organized; its clarification was clearly in the public interest. An abandonment of the Boundary Zone without a new schedule of standard rates would produce the very "chaos" and "confusion" the Court below found. (Fng. 14, R. 434)

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[1] Only a member of a Real Estate Board affiliated with the National Association of Real Estate Boards has the right to use the name "realtor." (Ex. 1, R. 454; Ex. 7, R. 488)

The members of the Washington Board, as their small number indicates, were a select group. The Board exercised great care in admitting agents to membership (R. 90-93) and maintains elaborate and unique facilities for their use and the use of the public. (See testimony of Mr. Rush, Executive Secretary, R. 29, 84-97; See Const. Ex. 3, R. 462) Among these facilities are a complete card index of owners containing 185,000 cards, posted to 48 hours (R. 29, 96); elaborate plat books, zoning maps, kept up to date; an apartment house file, an index of all building permits and "Statistical Data" of deeds recorded. (R. 94-97)

E. The Right to Offer Personal Services at Standard Rates; Sec. 6 of the Clayton Act:

One of the inherent difficulties of the Government in the present case is its inability to put its finger on precisely what segment of trade or commerce is, or could be, restrained. The Schedule of Standard rates constitutes an offer to perform services at the rates specified. (Fng. 17, R. 434) Is it the trade of "making offers" to perform personal services which is restrained? If not where is the "trade"? All the members of the Washington Board have done is to agree to offer to perform, *in futuro*, personal services in particular transactions at certain standard rates. (Fng. 17, R. 434) The Government concedes, Brief p. 58, that brokers operate pursuant to a series of independent contracts, each with a separate customer (see Gov. Ex. 26, R. 575), which raises the question whether there was any "trade" at all in the usual sense.

Up to now neither Congress nor the Courts have undertaken to prevent a man trying to get as much for his labor as sees fit. This would appear to be the ordinary right of free men. So far, a man has had the right to refuse to work until his price is met. This principle is enshrined in the Declaration of Independence (see *Allgeyer* v. *La.*, 165 U. S. 578) and is the announced policy of the labor legislation of the last decade, such as the *Wagner Act*, the *Norris-La Guardia Act* and the *Taft-Hartley Act*.

In the Anti-trust field it is contained in Sec. 6 of the *Clayton Act* which provides:

> "The labor of a human being is not a commodity or article of commerce." (15 U. S. C., Sec. 17)

The Government reads out this provision on the ground no employer-employee relationship is involved in the present case. (Gov. br. p. 58) But the quoted provision clearly has a wider application. It announces, as held in *U. S.* v. *Hutcheson*, 312 U. S. 219, see also *Apex Hosiery Co.* v.

Lie[illegible] 310 U. S. 469, 502-503, a rule of public policy, which [illegible] now, as the Court below noted, all courts and even the Executive Branch have heeded. (Op. below, R. 439)

The Court below, after holding the price fixing doctrine had never been invoked to charges for personal services, referred to the above quotation from Sec. 6 of the Clayton Act as follows:

> "This is a very important, basic pronouncement. The term 'labor' as used in the Clayton Act is not limited to the work of manual laborers or of mechanics. It comprises intellectual labor as well. Neither is the term restricted to the work of the poor or the needy. Thus there are labor unions of mechanics, of clerks, of teachers, and of airplane pilots. Many other similar instances might be adduced. All of these organizations fix wages or salaries to be charged by their members. Such activities have never been held to form violations of the Sherman Act *per se*.
>
> A real estate board may in a sense be likened to a labor union of real estate brokers. Admittedly there is no case in the Federal courts that has applied to personal services the rule that the fixing of prices of commodities or articles is *per se* an unreasonable restraint of trade. *To contract for one's personal services is a fundamental right of every man.* For men to combine to regulate the compensation to be charged by them for their own services is also entirely legal. While this right has been generally recognized in respect to persons who toil for wages or salaries, no reason appears discernible why it is not equally applicable in principle to those persons who work for commissions. The instant case appears to be the first occasion in the history of the enforcement of the Sherman Act that Government has challenged this right.
>
> "It is a matter of common knowledge that rates of commissions for brokers' services of various kinds have been openly prescribed by numerous organizations of brokers for a great many years. This activity has never been condemned as violative of the Sherman Act, and the Government has never so contended prior to this case. On the contrary, the resulting

stabilization of charges and the consequent uniformity has generally been considered as being in the public interest. No reason is perceived for changing these principles as they have been heretofore understood." (R. 439, Italics ours).

The Court below distinguished between commodities and personal services. (R. 439) If it be argued that in the price fixing of commodities all a man does is to offer his wares at a given rate, but still, they say, this is price-fixing, the answer is that any such agreement as to commodities works toward restraint and monopoly. Where, however, a minority group of men agree to offer their personal services at a given rate, the agreement does not tend toward an illegal restraint but toward the protection of a natural right. Also, where commodities are involved higher prices tend toward diminished trade. Where, on the other hand, personal services are involved the higher the brokers commission the more the broker will work and the more real estate he will sell.

We make the broad contention, necessary to avoid the philosophy of a Totalitarian State, from which all rights allegedly flow, that workers not only have the right to strive to increase their own wages but to join with others in that effort. We say this is their right naturally and not by any license or work-permit from the State. We think the Government, in its happy and headlong way, is getting into very deep water indeed when, in the present ill-chosen litigation, it attempts to abridge that right.[1]

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[1] In *Allgeyer* v. *La.*, 165 U. S. 578, this Court said:

"The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence . . . This right is a large ingredient in the civil liberty of the citizen."

See also Haines "*A Revival of Natural Law Concepts in State and Federal Judicial Decisions*," p. 82, 83; *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418, 439, making clear that the law merely "recognized" a pre-existing right. The right to organize is no more conferred by the Federal law than the right of free speech.

As Judge Chase said in his dissenting opinion in *Gardella* v. *Chandler*, 172 F. 2d 402, 406, with reference to a baseball player:

> "His services, or ability to work, are not subjects of trade or commerce within the anti-trust acts. Indeed, in Sec. 6 of the Clayton Act, 15 U. S. C. A. par 17, it is stated that, 'The labor of a human being is not a commodity or article of commerce.' Although this, to be sure, was inserted for a purpose not here germane it shows nevertheless that Congress did not intend in the anti-trust acts to cover restraints upon employment."

Since *Hopkins* v. *U. S.*, 171 U. S. 578, and *Anderson* v. *U. S.*, 171 U. S. 604, the Government has never proceeded against individuals who, acting without contact with outside groups (see *U. S.* v. *Hutcheson*, 312 U. S. 219; *Allen Bradley Co.* v. *Local Union*, 325 U. S. 797; *U. S.* v. *Borden Co.*, 308 U. S. 188), attempted to improve their wages, hours of labor, etc. The historic controversy as to whether the Sherman Act intended to exclude labor entirely (see Louis Boudin "The Sherman Act and Labor Disputes", 39 Col. L. Rev. 1283; 40 Col. L. Rev. 14; Berman "Labor and the Sherman Act"), thought to have been settled by the Clayton Act (prior to *Duplex Printing Press* v. *Deering*, 254 U. S. 443) has now *in fact* been settled by *U. S.* v. *Hutcheson*, 312 U. S. 219, which synthesizes the various labor laws into a consistent public policy. The *Hutcheson* case applies the test of self-interest, without combination with non-labor groups, to efforts of individuals to raise or maintain their wages or working conditions. The necessary implications from this Court's decision in *U. S.* v. *Hutcheson* outlaw any effort by the Government to restrain individuals in an association from doing nothing more than attempting to fix the wages at which they will work. Such efforts cannot, from the *Hutcheson* case on, constitute violations of the Anti-trust Acts.

The *Hutcheson* case was approved in *Allen Bradley* v. *Local Union*, 325 U. S. 797, which, after reviewing the history of labor legislation and its interpretation, once more stressed the doctrine of immunization of activities of labor groups when not combined with non-labor groups.

We do not believe that in order to come within the public policy of Sec. 6 of the Clayton Act it is necessary that an employer-employee relationship be the "matrix of the controversy",[1] a rule which is limited to the existence of a "labor dispute". It is common knowledge that "white collar" workers are not ordinarily organized in unions. Nevertheless, in justice, they should come within the public policy of Sec. 6. Otherwise, there would be a clear discrimination in favor of manual labor groups at a time when many of the latter are better off economically than the "white collar" workers. The Sherman and Clayton Acts are not to be construed as class legislation discriminating against the great middle-class.

The present case comes within the spirit of *U. S.* v. *Hutcheson, supra*. See *NLRB* v. *Hearst Publ.*, 322 U. S. 111; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91; *Bakery Drivers* v. *Wohl*, 315 U. S. 769; *People* v. *Gassman*, 295 N. Y. 254; 66 N. E. (2) 705; *Allen Bradley Co.* v. *Local Union*, 325 U. S. 797.

It is unnecessary for defendants to argue that the Washington Board is technically a "labor union." It is sufficient that Section 6 states that the labor of a human being is not a commodity or article of commerce. Cases such as *U. S.* v. *Second Vaccum Co.*, 310 U. S. 150, holding

[1] The holding in *Amer. Med. Assn.* v. *U. S.*, 130 F. (2) 233, 242, that this relationship must be the "matrix of the controversy" dealt with whether a technical "labor dispute" within the meaning of the Norris-La Guardia Act was presented. The Court did not deal with the public policy of Sec. 6 of the Clayton Act. Nor did the case involve wage-fixing. The same is true of the affirmance, *Am. Med. Assn.* v. *U. S.*, 317 U. S. 519.

that price-fixing is illegal *per se*, deal with commodities or articles of commerce. They are no authority for holding that wage-fixing is illegal *per se* or illegal at all. On examination, the Government's theory of the case, i. e., price fixing, shows palpably nothing but wage-fixing. What has been fixed? The price of services. What is the price of services? The answer is wages. Back of all this is the fact that, at most, defendant simply agreed upon the asking-price for their services.

F. The Hopkins and Anderson Cases:

These cases are pilloried by the Government as having been overruled by this Court in *Stafford* v. *Wallace*, 258 U. S. 495, 523-524; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230. (Gov. brief, p. 47, footnote 21.) On the other hand, they have been widely interpreted as holding that personal services are outside the scope of the Anti-trust Acts. See *Teller, Labor Disputes*, Sec. 190, p. 564. The two cases are carefully analyzed in Louis Boudin's "*The Sherman Act and Labor Disputes*", 39 Col. Law Review 1507.

This Court has never overruled these cases insofar as they deal with personal services; it is as to the nature of interstate commerce and the extent of the commerce clause that they are criticized. The cases above cited show this; see also *Wickard* v. *Filburn*, 317 U. S. 111, 121-122, Note 20. The gist of the holding in *Anderson* v. *U. S.*, 171 U. S. 604, is that an agreement between livestock traders not to do business with non-members was not a direct restraint on interstate commerce but a reasonable regulation of their own business. (See Anderson Op. p. 615-616). The basis of the decision in *Hopkins* v. *U. S.*, 171 U. S. 578, was that fixing livestock brokers' commissions was likewise not a direct restraint on interstate commerce because the business of the brokers was merely to furnish an aid or facility to such commerce. This was the theory on which the

Court decided the criminal case brought against the present defendants. (R. 306). The Court there said:

> "In my view the charges of a real estate broker on account of his personal services are nothing more than charges for *aids or facilities* furnished to clients whereby their objects may be the more easily and readily accomplished. . . . I feel that charges for services of this character and nature do not immediately touch upon or act upon nor do they directly affect the sale of real estate in the District of Columbia." (Op. Curran, J., R. 307, Italics ours)

The Court notes that "indirectly and as an incident they may enhance the cost to the owner of real estate . . . but they are not, in my opinion, charges which are directly laid upon real estate itself. Rather are they charges for facilities given or provided to clients in the course of the sale of real estate." (Op. Curran, J., R. 307-308) The Court cited with approval the *Hopkins* and *Anderson* cases and *State* v. *Duluth Board of Trade*, 107 Minn. 506.

Other cases showing personal services are outside the Act are:

People v. *Gassman*, 295 N. Y. 254; 66 N. E. (2) 705.
Hart v. *Keith Vaudeville Exchange*, 42 F. (2) 341.
Federal Baseball Club v. *National League*, 259 U. S. 200.
Sperry & Hutchinson Co. v. *Fenster*, 219 F. 755.
State v. *Duluth Board of Trade*, 107 Minn. 506.
Harelson v. *Tyler*, 281 Mo. 383.
Post v. *Bucks Stove & Range Co.*, 200 F. 918.
Hunt v. *Riverside Corp. Club*, 140 Mich. 538.
American League Baseball Club v. *Chase*, 86 Misc. 441.

An exceptional case, *More* v. *Bennett*, 140 Ill. 69, 29 N. E. 888, decided in 1892, held that an association of stenographers could not legally fix their own fees. The case was decided prior to the *Anderson* and *Hopkins* cases and prior to the Clayton Act. It has been cited only twice in the Federal Courts, in 85 F. at 285 and 242 F. at 473.

G. The Per Se Rule As to Price Fixing:

The Government's principal reliance in its brief, P. 43 *et seq.* is its claim that price fixing is always illegal *per se* on the basis of cases such as *U. S.* v. *Socony-Vacuum Oil* Co., 310 U. S. 150. The Court below held there was not even a contention the rates herein were unreasonable. (Concl. of Law 1, R. 435) [1]

We have already made the point that where personal services are involved price fixing of personal services is simply wage fixing. It is difficult to have much patience with the Government's threnody that "price fixing is always illegal *per se*". A moment's reflection suggests that in the whole vast field of labor relations (not immune from the Anti-trust Acts; see *Allen Bradley Co.* v. *Local Union*, 325 U. S. 707) the statement is palpably untrue. As is well known, unions every day in the week "conspire" to fix the price of wages. It is not quite an answer for the Government to claim that this is because of permissive authority contained in the *Wagner Act, Norris-La Guardia Act, Taft-Hartley Act, etc.* We claim that it is an inherent right of workers to agree with their fellows as to the price of their toil. Any other view went out of fashion about the time the courts decided that labor unions, strikes, etc., were not actionable conspiracies [2] though we will admit there is a wilful group of Statists who would like to revive the idea that the right of workers to act collectively is a right, like everything else, they say, derived from the State. But in any event the statement "Price fixing is illegal *per se*," which runs like a Wagnerian leit-motif through so much of the Government's thinking, is a mere general statement which must be limited to the facts and

[1] In a colloquy with Government Counsel, the Court said: "You conceded you had no proof that the rate was unreasonable." (R. 350)

[2] See *Frankfurter and Greene, The Labor Injunction*, Chap. 1; *Great, Attitude of American Courts in Labor Cases*, 42 Col. Univ. Studies, p. 36-38; *Teller, Labor Disputes*, Sec. 60.

circumstances in the particular case. A wise Frenchman, Larochefoucault, once remarked, "All general statements are untrue, including this one." Along the same line, this Court in *Armour & Co. v. Wantock*, 323 U. S. 126 stated:

> "words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the court. General expressions transposed to the facts are often misleading."

We follow the Court below when it states that the *per se* shibboleth has never been invoked to charges for personal services. (Op. R. 439-440)

The cases cited by the Government in its brief, page 46-47, to support its contention that personal services are within the *per se* rule are not in point. The conspicuous fact is that in all these cases physical things were involved and there was an article akin to a commodity either moving in interstate commerce as in *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, or an article worked upon and transported within the District of Columbia as in *Atlantic Cleaners & Dyers, Inc. v. U. S.*, 286 U. S. 427. This distinction clearly applies to cases such as *U. S. v. Socony-Vacuum Co.*, 310 U. S. 150; *U. S. v. Line Material Co.*, 333 U. S. 287. In *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, physical films were involved. *Gardella v. Chandler*, 172 F. (2) 402, the baseball case, and *Ring v. Spina*, 148 F. (2) 647, involved circumstances showing substantial physical resultants in interstate commerce. In *U. S. v. South Eastern Underwriters Association*, 322 U. S. 533, the case did not turn upon personal services. The insurance referred to involved use of vast aggregations of capital in exploiting which personal services were purely incidental. In the present case, it is clear that any use of capital would merely lead up to the ultimate moment when a real estate broker, having found a prospect, would

proceed by personal salesmanship to sell him the property. The fact that certain members of the Washington Board were incorporated (see List Ex. 3, R. 598) does not, as contended by the Government in its brief, page 48, prevent their services being personal. Although the business may have been carried on in corporate form the end-result would, in every case, involve personal services.

Atlantic Cleaners & Dyers v. *U. S.*, 286 U. S. 427, does not govern the present case. The defendants there were corporations and their officers in the business of dyeing and cleaning for profit. The article of commerce was the dyed or cleaned garment which was re-delivered to the customer. Further, an allocation of territory was present. No question was involved of the wages of the individual dyers and cleaners who did the work. In any event Section 6 of the Clayton Act, as interpreted in *U. S. v. Hutcheson*, 312 U. S. 219, grants immunity under *all* provisions of the Anti-trust Acts, including the coverage of Section 3 of the Sherman Act as expanded in the *Atlantic Cleaners & Dyers* case.

Likewise the state court cases cited by the Government on page 45 of its brief, footnote 20, to the effect that price fixing of services violates state anti-trust laws show conspicuously, that physical things were the end-result of the so-called services. Thus, stenographers produce a transcript, blacksmiths a horseshoe, plumbers plumbing, livery men horses, printers a book, etc. In the present case, real estate brokers produce nothing but a contract between the buyer and the seller of which the written page is merely the evidence.

H. Offering Price of Services in Schedule Was Non-Mandatory:

It seems self-evident that as the Schedule of Standard Commissions simply published an *offer* on the part of realtors to perform services at a certain rate (Fng. 17, R. 434) it

was, in the nature of things, non-mandatory. The owner could accept or refuse the offer as he saw fit. This was specifically held by the Court below which said that the rates in the Schedules "have been construed by the members as non-mandatory in character, and as setting forth a basis upon which to establish fair compensation for services performed." (Fng. 16, R. 434)

The Government, in its brief, p. 32, says this finding was apparently based on the evidence that the Board had never penalized members for failure to adhere to the Schedule. We differ and think there were other substantial bases for this finding.

First, the Schedule of Standard Commissions, Ex. 25, R. 569, states that the *standard* commission on sales of real estate shall be thus and so. There is a certain good sense inhering in the word "standard", which suggests that the commission may be more or less depending on whether the transaction departs from standard. (R. 137). The Code of Ethics of the Washington Board in Ex. 5, R. 478 provides:

> "Brokers should maintain the standard rates of commission adopted by the Board and no business should be *solicited* at lower rates." (Italics ours)

This provision is palpably non-mandatory in form and simply suggests that brokers "should" maintain the rates. The provision existed since 1934 (R. 99); long before the Schedule of Standard Commissions of February 16, 1943 was adopted. (Ex. 28, R. 578; see R. 107-108).

Mr. Charles J. Rush, Secretary of the Washington Board since 1932 (R. 29), testified in answer to questions by the Court that there was nothing whatever to prevent a broker charging anything he wanted; that it was a matter of private agreement (R. 123-124). Deals were frequently made on the basis of the broker taking less than his commission and this happened all the time. (R. 24). As to

what happened in that event in the nature of reprisals, the answer was "nothing". (R. 124). The Court asked the following questions:

> "THE COURT: So that even though the Board has in its Code of Ethics these schedules, there is nothing to prevent a real estate broker who is a member of the Washington Board from going out and, as a matter of fact, charging any commission he sees fit, is that right?
>
> "THE WITNESS: That is right, sir." (R. 124).

No member had ever been disciplined or suspended or expelled. (R. 132-133). Mr. Rush further testified:

> "Q. So that, notwithstanding all this we have heard with reference to the fixing of fees, isn't it true that the individual broker in an individual transaction can charge any commission to which the seller or the purchaser agrees?
>
> "A. It is always a question of agreement, yes, sir.
>
> "Q. And of an individual agreement in each individual case?
>
> "A. Every case is an individual one.
>
> "Q. And you exercise no control over what the individual broker does with his individual commission?
>
> "A. No, sir.
>
> "Q. And you know that to be a fact, don't you?
>
> "A. Mr. Leahy, I have been doing this work for 25 years, sir. I do know that is the truth." (R. 124-125).

The members took less than the standard rate in innumerable instances. (R. 128). The standard rates of commission were used by members and non-members alike. (R. 137-138). The standard rates were furnished for the information of the public as representing what the Washington Board thought was fair compensation and as a standard which should be observed in the ordinary case. (R. 137-138). It was common knowledge that the standard was not observed in many cases. The court at one time fixed

the rate at less (R. 138). Where 50 or 60 houses were built the brokerage fee was less, (R. 138), sometimes $100 per house, regardless of cost. (R. 139). No member was ever disciplined for this or for failure to adhere to the standard charges. (R. 139).

Mr. Rush's testimony was supported by two Government witnesses, members of the Washington Board. Mr. J. Garrett Beitzell, Vice-President and a director of the Washington Board, testified that he never even used the standard form of contract of the Washington Board but used his own form. (R. 261). The commission rate was always subject to agreement between the parties; he never considered himself bound by the Code of Ethics to charge any given rate. This was general practice (R. 261), as he stated:

> "We discuss every deal; every deal stood on its own. We discussed what the man would have to pay. He would want to know how much net he would give so he was thoroughly familiar with the contract." (R. 261, 262).

After talking it over, the seller was willing to pay what was fair and reasonable, which was sometimes 5% and 3% and sometimes not. If he felt he was losing money on a piece of property, the agent adjusted the commission to meet the conditions and that was known to the Washington Board. (R. 262). He made statements at directors' meetings on a number of occasions that he had taken less than the regular commission. (R. 262). Taking less than the so-called standard was discussed very frequently with other members of the Board. Mr. Beitzell said:

> "In fact, I don't think there was any one of them who hadn't done it at one time or another. That was common knowledge among the Board." (R. 263).

It was common knowledge that the broker negotiated the rate of commission in each individual case with each individual purchaser or seller. (R. 263). There had never

been any disciplinary action for so doing. (R. 263). As a member of the Board for fifteen years, Mr. Beitzell testified that the so-called standard rate was the recommended rate generally admitted by custom and the courts to be the fair standard of compensation in the ordinary everyday real estate transaction. (R. 264). It was a yardstick or standard but it was left to the individual broker to arrange his own commission in each individual case. After February 1943, this was specifically recognized. (R. 264). He did not construe the Code of Ethics to restrict the members in the right to negotiate their own commissions as the business demanded. Mr. Beitzell confirmed Mr. Rush's testimony as to commissions on veterans' projects for which he charged $50.00 a deal. (R. 266-267). This was not unusual. (R. 267). Mr. Beitzell testified:

> "Q. So that in your entire experience of 15 years as a member of the local board, have you at any time ever found that the interpretation of the ethics was to the effect that they fixed commissions, in effect that they fixed your commission which you were negotiating with your purchaser or with your seller at any individual time?
>
> "A. I have never heard that question come up the whole time I have belonged to the board; not one time.
>
> "Q. And the practice among the members has been to the contrary, hasn't it?
>
> "A. It has, definitely." (R. 267)

As to the National Association, the witness never considered members of the Washington Board were bound by any provision of the Code of Ethics of the National Association to adhere to any particular scale of commissions. (R. 268) The arrangement with the National Association had never been construed to prevent a member negotiating his own individual contract. (R. 268).

Another Government witness, Mr. J. Wesley Buchanan, a member of the Washington Board since 1931 (R. 274) and a director, testified that members generally adhered

to the rate schedule on standard or usual deals. (R. 277). There was never any policing of the commission rates on the part of the National Association. (R. 282). He had never heard of any communication on the subject from the National. (R. 282). The provision of the Code of Ethics as to observance of the commission rate represented an ideal. (R. 283). There was no "must" in respect to the commission rate. (R. 288). The schedule was publicly adopted for the benefit of the public as a representation of fair and adequate compensation. (R. 289) There was no thought of disciplinary action, (R. 39) nor was anything said or done by the National Association which compelled brokers to charge what was recommended in the schedule and no other rate. (R. 289). Each broker was always left free to contract with any member of the public with relation to any commission. (R. 289). The brokers freedom to act, with reference to a valuation put by him on his own services, was not taken from him. (R. 289). After adoption of the February, 1943, schedule, the members went along in the old way and negotiated each transaction freely with the owner (R. 289) and whatever agreement was struck was the agreement between the parties as to the commission rate. (R. 290). The rates were fixed by the individual member in the individual case with the individual customer. (R. 290). As to a standard rate, there was a difference between a standard deal and other deals. (R. 291). The Code of Ethics established ethical standards for the brokers in the interest of the public. (R. 291). Brokers always had the right to charge whatever each individually thought was fair and the Board never sought to control the broker in that respect. (R. 292). He knew of no such instance where the Board ever sought such control of the members. (R. 292). The rates were well known among the owners of property (R. 292-293) and have been followed by the courts as the regular rate. If conditions were such that the regular commission ought not to be adhered to, a

broker did not hesitate to make his own contract to cover the case; (R. 293).

Mr. Buchanan confirmed the other witnesses in respect of lower rates in G. I. cases. (R. 294).

We think the evidence is overwhelming that as held by the Court below (Fng. 16, R. 434) the Schedules of Standard Commissions were non-mandatory and simply set forth a basis upon which to estimate fair compensation for services performed. The Court's findings in this respect in no way depended, as the Government claims, on the bare fact that there was no penalty. (See Gov. brief p. 32). Under this Court's decision in *U. S. v. Yellow Cab Co.*, 94 L. Ed. Adv. 123, the Court's findings are unassailable. The mandatory or non-mandatory nature of the rates, read in connection with Sec. 3 of the Code of Ethics, (Ex. 5, R. 478) was specifically put in issue by the Washington Board by its Second Defense (R. 391-392) and Tenth (R. 391-2), Fourteenth and Fifteenth Defenses (R. 392-393). Defendants' Sixteenth Defense (R. 393) made a like contention with respect to Article 9 of the National Association's Code of Ethics. These defenses involve the crux of the case. The testimony below does not show mere non-observance of an agreement made; it shows the alleged agreement was different from what the Government contends it was.[1]

I. Appalachian Coals v. U. S. and Apex Hosiery Co. v. Leader Are Nearest the Present Case:

The case nearest the present is *Appalachian Coals v. U. S.*, 288 U. S. 344. In each case we have acts done "fairly and openly" (Gov. S. R. 433); in each case it clearly appears the acts done were regulatory in character and designed to remedy a situation inimical to the trade.

[1] As to oral testimony to show the background and meaning of corporate resolutions see Mr. Justice Rutledge's opinion in *Fox v. Johnson & Wimsatt, Inc.*, 127 F. (2) 729, 735 and authorities cited.

We think this Court could almost take judicial notice that it is in the public interest that the public should have some sort of authoritative guide as to what commission is proper in a real estate deal. It must be remembered that unlike buying and selling other things, the average man usually buys or sells real estate only once or twice in his life; yet, when he does so, the single transaction runs into substantial sums. Usually it is his home or his place of business that he sells. We ask the members of this Court to consider how often they themselves have bought or sold real estate and whether, lacking some dependable guide, such as a real estate Board's Schedule of Standard Rates, they would have any idea as to what a fair commission would be for the broker. Can it therefore be said, quoting from *Nash* v. *U. S.*, 229 U. S. 373, 376, that the alleged agreement herein is one "which by reason of intent or the inherent nature of the contemplated acts prejudices the public interests by unduly restricting competition." Applying "the essential standards of reasonableness" can it fairly be said that what defendants did was not "an honest effort to remove abuses"—or if not abuses, at least inequities inhering in the Boundary Zone.

The Court below found that:

> "Before the Board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive charges, and one of the purposes of the Board was to eliminate this undesirable condition." (Fng. 14, R. 434)

The Government contends in its brief, page 54, footnote 27, and page 10, footnote 6, that there is no evidence in the record to support the above finding. We have already shown that the rates of February 13, 1943, grew out of the chaos and confusion involving the Boundary Zone. (See present brief, p. 8). The Court itself (Judge Holtzoff) said: "I suppose it would be a terrible thing for the public if there was no standard rate." (Tr. June 27, 1949, p. 19). The Court (Judge Curran) in the

Criminal Case, said: "That's all I have been hearing for the past two or three days is that because of the confusion that existed in the industry that something ought to be done. . . ." (R. 171). Government Counsel himself stated: "We say they got together and said these rates throughout the country are topsy-turvy, people get confused." (R. 198).

We think that the above amply shows chaos and confusion in the industry, both with respect to the confusion resulting from the Boundary Zone (see present brief, p. 8) and in the industry generally. Certainly there is enough showing under *U. S.* v. *Yellow Cab Co.*, 94 L. Ed. Adv. 123, to resist the unsupported assertions to the contrary made by the Government in its brief, page 54, footnote 27 and page 10, footnote 6. The Government appears to forget that under the above case the burden is upon the *Government* to prove that findings of fact are clearly erroneous; they are not to be overturned by mere expression of disdain.

In addition to *Appalachian Coals* v. *U. S.*, *supra*, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, is in favor of appellees. The Government cites it in its brief, p. 45, as holding that the Sherman Act applies to the marketing of "goods or services" which statement appears in the Court's opinion at p. 495 and 498. Nothing could be further from the fact than that "services" were involved in the *Apex* case. The *Apex* case involved a sit-down strike of workers in a factory. This Court in using the word "services" clearly referred to services such as those of railroads, etc., as footnote 16, p. 495 shows.

The case, however, is in point as holding that the Sherman Act admittedly does not condemn all combinations and conspiracies. (Op. p. 486). There must be some form of restraint upon commercial competition. (Op. p. 495). The Court below found as a fact that (Fng. 13, R. 434) there was no proof that the commercial rates were un-

reasonable or that this activity unduly or unreasonably restrains competition or adversely affects the sale of real estate. The Court in the *Apex* case said that "some form of restraint of commercial competition has been the *sine qua non*" and that the restraints must be "so substantial as to affect market prices." (Op. p. 500) The Court continued:

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in par. 6 of the Clayton Act, 15 USCA, par. 17 that 'the labor of a human being is not a commodity or article of commerce . . . nor shall such (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' *it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.*". (Op. p. 502-503) (Italics ours)

The above is an authoritative pronouncement of this Court as to the meaning of Sec. 6 of the Clayton Act and of itself ought to govern the present case.

Later in the same opinion (pp. 509-511) the Court holds that indirect restraints of physical products do not come within the scope of the Sherman Act where the conspiracy was not directed at that commerce. (p. 511). The Court held "that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition." In referring to intent as a prerequisite to liability, the Court reiterated that the conspiracy "must be aimed or directed at the kind of restraint that the Act prohibits or that such restraint is

the natural and probable consequences of the conspiracy." (Op. 511).

It is our position that under *Appalachian Coals* v. *U. S.*, *supra, and Apex Hosiery Co.* v. *Leader*, *supra*, see also *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231, with every possible concession to the Government, there was no actionable conspiracy herein.

II

The Judgment of Acquittal of Appellees National Association of Real Estate Boards and Washington Real Estate in Criminal Action No. 950-47 is Res Judicata in This Action as Between Appellant and All Appellees, So That Appellees Were Entitled to a Judgment in Their Favor Upon Their First Supplemental Defense.

We urge *res judicata* as an independent ground for affirmance. The judgment of acquittal in the criminal case (R. 310) resulted from defendants' motion to that effect made at the close of the Government's case. (R. 304).[1]

The defense of *res judicata*, based on the above judgment, was asserted in the civil case by Supplemental Answers (R. 417-422), upon which Motions for Summary Judgment were made by defendants (R. 420, 425) which the Court (Judge Goldsborough) denied. (R. 425-426). *Res judicata* was re-asserted at the trial below (Engs. 21-27, R. 434-435) and the defense overruled on final hearing. (Concl. of Law 4, R. 436). The Government correctly anticipated we would assert it here. (See Gov. Br., p. 62-72).

The doctrine of *res judicata* is deeply entrenched in our common law. It is based on the proposition that once the parties or their privies have litigated, or have had an opportunity to litigate, a cause of action or an issue of

[1] See Motion *verbatim* present Brief p. 55.

law or fact, and a court of competent jurisdiction has finally determined the cause of action or the issue, the parties and their privies are bound by the previous adjudication in any future litigation.

Commissioner v. *Sunnen*, 92 L. Ed. (Adv.) 673 (1948)

Scalfon v. *U. S.*, 332 U. S. 575.

Morris v. *Jones*, 329 U. S. 545 (1947).

Baldwin v. *Iowa State Traveling Men's Asso.*, 283 U. S. 522 (1931).

Southern Pacific R. Co. v. *United States*, 168 U. S. 1 (1897).

Cromwell v. *County of Sac*, 94 U. S. 351 (1876).

Brocy v. *Brown*, 74 App. D. C. 309, 122 F. 2d 219 (1941).

Bennett v. *Commissioner*, 113 F. 2d 837 (CCA, 5th, 1940).

30 Am. Jur., "Judgments" § 165.

2 *Black on Judgments*, 2d ed. (1902) § 609, p. 924.

See also the concurring opinion in *United States* v. *United States Gypsum Co.*, 51 F. Supp. 613, 615, 616 (D. C. D. C. 1943).

In *Southern Pacific R. Co.* v. *United States*, *supra*, this Court said:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

> Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." 168 U. S. at 48-9.

The general principle is applicable with respect to two successive criminal cases, *United States* v. *Oppenheimer*, 242 U. S. 85, 3 A. L. R. 516 (1916), and is applicable in a civil case after the final determination of a criminal case *Local 167* v. *United States*, 291 U. S. 293 (1934); *United States* v. *Salen*, 244 Fed. 296, 298-9 (S. D. N. Y. 1917); *United States* v. *Warner Bros. Pictures*, 13 F. Supp. 614, 615-6 (E. D. Mo. 1936); with the exception of criminal cases ending in an acquittal *on the general verdict of a jury*. *Helvering* v. *Mitchell*, 303 U. S. 391 (1938); *United States* v. *Warner Bros. Pictures*, *supra*; but cf. *Coffey* v. *United States*, 116 U. S. 436 (1886); and *cf. Stone* v. *United States*, 167 U. S. 178 (1897).[1] In many ways the instant case is more nearly like the *Coffey* case than the *Mitchell*, since with respect to *corporations*, what amounts to a death sentence, that is dissolution can result from a civil anti-trust decree.

The Mitchell exception to the doctrine of *res judicata* is based on the impossibility ordinarily, of determination upon a record containing a criminal general jury verdict whether the issues were concluded favorably to the defendant or whether the defendant was acquitted because, although the government proved its case by a preponderance of the evidence, it did not prove it beyond a reasonable doubt. *Helvering* v. *Mitchell*, *supra*, 303 U. S. 402-3. The Court in that case was also impressed by the fact that defendants there could not have been forced to testify in the government's behalf in the previous criminal trial.

[1] Presumably a jury verdict. However, the issues of law and fact in the criminal and civil cases differed so that the *Stone* case is not in point. 167 U. S. 188-9.

Id., 303. But since the Court did not overrule *Coffey v. United States, supra,* which had applied *res judicata* in a civil case based on a jury verdict in a criminal case, *but differentiated it on the basis that there was no difference in the burden of proof, Id.*, 405-6, the *Mitchell* case merely stands for an exception to the general doctrine of *res judicata* when the impossibility of telling whether or not a general jury verdict is based upon a failure to prove the crime beyond a reasonable doubt makes it impossible for a court in a subsequent case to determine how the issues actually were decided in the prior criminal proceeding.[2] The instant case satisfies all the requirements of the *res judicata* doctrine, and does not fall within the very narrow exception to that doctrine laid down in the *Mitchell* case, so that all the Appellees are entitled to have judgment in their behalf upon their first supplemental defense of *res judicata.*

Identity of parties.

Appellant was plaintiff in Criminal Action No. 950-47 (R. 313), and was, therefore, a party and subject to the jurisdiction of the District Court. Appellees National Association of Real Estate Boards and Washington Real Estate Board were defendants in Criminal Action No. 950-47, (R. 313), so were likewise parties thereto. They each appeared generally in that action (R. 320) so were also subject to the jurisdiction of the District Court.

Appellee Nelson is the Executive Vice-President and Executive Secretary of Appellee National Association of Real Estate Boards (R. 365) and the remaining Appellees are directors of Appellee Washington Real Estate Board

[2] Mr. Justice Stephens in his concurring opinion in *United States v. United States Gypsum Co.*, 51 F. Supp. 613 at 628 (D. D. C. 1943) suggests that if the trial judge directs a verdict a similar exception to the rule may arise as upon a jury verdict, since the direction could have been on the issue of reasonable doubt, unless something in the record showed that it was directed upon different grounds.

(R. 366), and are also sued as representing all the members of Appellee Washington Real Estate Board (R. 366). Since parties *and their privies* may rely upon *res judicata*, the individual Appellee may rely upon this defense to the same extent as may the corporate Appellees. *Oklahoma* v. *Texas*, 256 U. S. 70 (1921); *Hartford L. Ins. Co.* v. *Ibs*, 237 U. S. 662 (1915); *Southern Pacific R. Co.* v. *United States*, *supra*. As this Court said in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 at 402 (1940):

> "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611, 620, 53 ALR 1265, 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be different, . . . and parties nominally different may be, in legal effect, the same.' A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. *Cromwell* v. *Sac County*."

Identity of cause of action and issues.

The cause of action as well as the material issues of law and fact in Criminal Action No. 950-47 were the same as in the instant action. The alleged cause of action in both cases was a violation of Section 3 of the Sherman Act (15 U. S. C. A. §3). That these causes of action and, just as important, the issues of law and fact in Criminal Action No. 950-47 and the instant case were the same appears from a comparison of the indictment in the former (R. 313-319) with the complaint in the latter (R. 364-372). Both, incidentally, were filed the same day (R. 313, 364).[3]

Parallel columns will show the identity of the averments of the indictment with those of the civil complaint:

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[3] It is, of coure, immaterial to the doctrine of *res judicata* which action is filed first, the earlier judgment being controlling, *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611 (1926).

Indictment

1. National Association of Real Estate Boards (hereinafter referred to as "National Association") is hereby indicted and made a defendant herein. National Association is a corporation organized in 1908 and existing by virtue of the laws of the State of Illinois. It transacts business and is found in the District of Columbia. It is a national trade association comprised of (1) approximately 28,000 real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia, and (2) approximately 800 local associations of real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia.

2. Washington Real Estate Board (hereinafter referred to as "Washington Board") is hereby indicted and made a defendant herein. Washington Board is a corporation organized in 1928 and existing by virtue of the laws of the District of Columbia. It is a successor to an unincorporated association of real estate brokers known as Real Estate Brokers Association of Washington City, D. C., or-

Civil Complaint

3. Defendant National Association is a corporation organized in 1908 and existing by virtue of the laws of the State of Illinois. It is a national trade association comprised of (1) approximately 28,000 real estate brokers and others affiliated with real estate business throughout the United States including the District of Columbia, and (2) approximately 800 local associations of real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia. Defendant Herbert U. Nelson is and has been for many years Executive Vice-President and Executive Secretary of defendant National Association.

4. Defendant Washington Board is a corporation organized in 1928 and existing by virtue of the laws of the District of Columbia. It is a successor to an unincorporated association of real estate brokers known as Real Estate Brokers Association of Washington City, D. C., organized in the District of Columbia in 1913. Said Washington Board is a trade association with a membership consisting of approxi-

Indictment

ganized in the District of Columbia in 1913. Said Washington Board is a trade association with a membership consisting of approximately 250 real estate brokers and others affiliated with the real estate business, including several banks, building and loan associations, life insurance companies, and title companies, all doing busness in the District of Columbia. Washington Board and all members thereof are members of the National Association.

3. The acts alleged in this indictment to have been done by each of the defendant corporations were authorized, ordered or done by the officers and directors of each of said corporations.

4. Various persons not made defendants herein participated as co-conspirators with the defendants in the offenses hereinafter charged, and performed acts and made statements in furtherance of the effectuation thereof. These co-conspirators include (a) those who have been officers and members of the Washington Board and individuals who, from time to time, acted as the representatives of the members in meetings and other activities of the Wash-

Civil Complaint

mately 250 real estate brokers and others affiliated with the real estate business, including several banks, building and loan associations, life insurance companies, and title companies, all doing business in the District of Columbia. Washington Board and all members thereof are members of the National Association.

7. Various persons not made defendants herein participated as co-conspirators with the defendants in the offenses hereinafter charged, and performed acts and made statements in furtherance of the effectuation thereof. These co-conspirators include (a) those who have been officers and members of the Washington Board and individuals who, from time to time, acted as the representatives of the members in meetings and other activities of the Wash-

Indictment	*Civil Complaint*
ington Board, and (b) those who have been officers, directors and members of committees of the National Association.	ington Board, and (b) those who have been officers, directors and members of committees of the National Association.
5. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia.	8. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.
6. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.	8. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.

Indictment

7. Due to the transient nature of a large percentage of the population of the District of Columbia, a particular parcel of real estate or apartment may be sold, leased, or rented by a broker to a great number of purchasers, lessees or tenants within a short period of time. A brokerage commission or fee is realized from each such sale or lease.

8. Under present market conditions the demand for residential and commercial properties in the District of Columbia is greater than the available supply. Purchasers or tenants are readily available to brokers acting as agents for the sale or rental of residential and commercial properties in the District of Columbia. The compensation of said brokers is in the form of a commission determined by a percentage of the sales or rental price regardless of the nature and amount of services rendered by said brokers.

9. For many years up to and including the date of the return of this indictment, the defendants and their co-conspirators have been engaged in a combination and conspiracy to restrain the trade and commerce of the District of Columbia in the sale, ex-

Civil Complaint

9. Due to the transient nature of a large percentage of the population of the District of Columbia, a particular parcel of real estate or apartment may be sold, leased, or rented by a broker to a great number of purchasers, lessees or tenants within a short period of time. A brokerage commission or fee is realized from each such sale or lease.

10. Under present market conditions the demand for residential and commercial properties in the District of Columbia is greater than the available supply. Purchasers or tenants are readily available to brokers acting as agents for the sale or rental of residential and commercial properties in the District of Columbia. The compensation of said brokers is in the form of a commission determined by a percentage of the sales or rental price regardless of the nature and amount of services rendered by said brokers.

11. For many years up to and including the date of filing this complaint, the defendants and others have been and now are engaged in a combination and conspiracy to restrain the trade and commerce of the District of Columbia in the sale,

Indictment

change, lease and management of real property and the improvements thereon, all in violation of Section 3 of the Act of Congress of July 2, 1890, as amended, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, that is to say:

10. The defendants and their co-conspirators have agreed upon and fixed rates of commission to be charged by the members of the defendant corporations in the District of Columbia for acting as agents in the sale, exchange, lease and management of real property and the improvements thereon.

11. The aforesaid combination and conspiracy, and the acts, agreements and understandings which formed a part of and were used in effectuation thereof, have

Civil Complaint

exchange, lease and management of real property and the improvements thereon, all in violation of Section 3 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act. Said unlawful combination and conspiracy is continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

12. By agreeing to observe and by observing the Constitution, By-Laws, Code of Ethics, and other rules of the Washington Board and of the National Association, as amended from time to time, and by performing the acts and engaging in conduct hereinbefore and hereinafter alleged, the defendants and their co-conspirators have continuously planned and acted together to discourage members of the Washington Board from charging rates of commission other than those fixed by said Washington Board.

13. The aforesaid combination and conspiracy, and the acts, agreements and understandings which formed a part of and were used in effectuation thereof, have

Indictment	*Civil Complaint*
been carried out by divers means and methods including those hereinafter described.	been carried out by divers means and methods including those hereinafter described.
12. For many years prior to January 1, 1947, the National Association had a Committee on Rates, Rules and Customs. One of the purposes of said Committee was to raise brokerage commission rates and achieve uniformity in said rates throughout the United States including the District of Columbia. Said Committee made studies of brokerage commission rates prevailing in various states of the United States and in the District of Columbia, and thereafter initiated a plan to raise rates of commission charged by various members of the National Association throughout the United States, including those doing business in the District of Columbia, and to achieve uniformity in those rates.	14. For many years prior to January 1, 1947 the National Association had a Committee on Rates, Rules and Customs. One of the purposes of said Committee was to raise brokerage rates throughout the United States including the District of Columbia. Said Committee made studies of brokerage commission rates prevailing in various states of the United States and in the District of Columbia, and thereafter initiated a plan to raise rates of commission charged by various members of the National Association throughout the United Sfates, including those doing business in the District of Columbia, and to achieve uniformity in those rates.
13. In accordance with the recommendations of the National Association, the Washington Board, as hereinafter set forth, increased the rates established in its schedule of commissions.	15. In accordance with the recommendations of the National Association, the Washington Board, as hereinafter set forth, increased the rates established in its schedule of commissions.
14. Members of the Washington Board agree as a condition of membership in the National Association to	16. Members of the Washington Board agree as a condition of membership in the National Association to

Indictment

abide by the Code of Ethics of the National Association. Article 9 of this Code requires each member of each local real estate board, including the Washington Board, to observe the schedule of commissions established by the local board of which each is a member.

15. Article 14 of the Constitution and By-Laws of the Washington Board provides that said Board may adopt specific rules of practice or "ethics" and that any such rules, when adopted, are binding on each member. In accordance with this provision, the Washington Board has adopted a schedule of commissions which fixes the standard rates of commissions to be charged by its members for acting as agents in the sale, exchange, lease and management of real property in the District of Columbia.

16. Section 3 of the Code of Ethics of the Washington Board provides:

> Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates.

All members of the Washington Board agree and

Civil Complaint

abide by the Code of Ethics of the National Association. Article 9 of this Code requires each member of each local real estate board, including the Washington Board, to observe the schedule of commissions established by the local board of which each is a member.

17. Article 14 of the Constitution and By-Laws of the Washington Board provides that said Board may adopt specific rules of practice or "ethics" and that any such rules, when adopted, are binding on each member. In accordance with this provision, the Washington Board has adopted a schedule of commissions which fixes the standard rates of commissions to be charged by its members for acting as agents in the sale, exchange, lease and management of real property in the District of Columbia.

18. Section 3 of the Code of Ethics of the Washington Board provides:

> Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates.

All members of the Washington Board agree and

Indictment

have agreed as a condition of membership to abide by this Code of Ethics, and in accordance therewith, said members adhere and have adhered to the schedule of commissions established by the Washington Board.

17. On February 16, 1943 the schedule of commissions which had been in effect for several years, was revised by the Washington Board and the members thereof agreed to adhere and have generally adhered to the new schedule. This revised schedule substantially increased the commission rates required to be charged by the members of said Washington Board.

18. The schedule of commissions of the Washington Board which had been in effect prior to February 16, 1943, required each of its members, when acting as agent in the sale of real estate in the Washington city area, which included most of the District of Columbia, to charge a rate of commission of 5% on the first $5,000 of the sales price, and an additional 3% on the excess above $5,000.

19. On February 16, 1943 a new schedule increasing these rates was approved

Civil Complaint

have agreed as a condition of membership to abide by this Code of Ethics, and in accordance therewith, said members adhere and have adhered to the schedule of commissions established by the Washington Board.

19. On February 16, 1943 the schedule of commissions which had been in effect for several years, was revised by the Washington Board and the members thereof agreed to adhere and have generally adhered to the new schedule. This revised schedule substantially increased the commission rates required to be charged by the members of said Washington Board.

20. The schedule of commissions of the Washington Board which had been in effect prior to February 16, 1943, required each of its members, when acting as agent in the sale of real estate in the Washington city area, which included most of the District of Columbia, to charge a rate of commission of 5% on the first $5,000 of the sales price, and an additional 3% on the excess above $5,000.

21. On February 16, 1943 a new schedule increasing these rates was approved

Indictment

at a special meeting of the Washington Board. This schedule provided in part as follows:

> The commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000 and 3% on the excess above $50,000.

22. In addition to the provisions in the schedule fixing rates of commission on sales of real estate, the Washington Board issues a standard form sales contract which is generally used by real estate brokers in the District of Columbia. This contract contains the following provision with respect to rates of commission:

> The seller agrees to pay to Agent the regular rate of commission fixed by the Washington Real Estate Board.

Civil Complaint

at a special meeting of the Washington Board. This schedule provided in part as follows:

> The commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000 and 3% on the excess above $50,000.

20. In addition to the provisions in the schedule fixing rates of commission on sales of real estate, the Washington Board issues a standard form sales contract which is generally used by real estate brokers in the District of Columbia. This contract contains the following provision with respect to rates of commission:

> The seller agrees to pay to Agent the regular rate of commission fixed by the Washington Real Estate Board.

The remainder of the Indictment, paragraphs 21 and 22, dealing with "Commission Rate Fixing on Exchanges of Real Estate" are identical with paragraphs 23 and 24 of the Complaint, under the same title; paragraphs 23 and 24 of the Indictment, under the heading "Commission Rate Fixing on Leases" are identical with paragraphs 25 and 26 of the Complaint, under the same heading; paragraph 25 of the Indictment under the heading, "Commission Rate Fixing on Management of Real Estate" is identical

with paragraph 27 of the Complaint under the same heading. The "Effects of Offenses Charged" in the Indictment and in the Complaint are identical as follows:

Indictment	*Civil Complaint*
26. The aforesaid combination and conspiracy, agreements, understandings and concert of action hereinbefore alleged, have had, as intended by the defendants, the following effects:	28. The aforesaid combination and conspiracy, agreements, understandings and concert of action hereinbefore alleged, have had, as intended by the defendants, the following effects:
(a) Competition between members of the defendants in determining fees to be charged for selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia has been eliminated.	(a) Competition between the individual defendants (other than Nelson) in determining fees to be charged for selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia has been eliminated.
(b) The amounts paid for commissions to brokers for the sale of houses in a large part of the District of Columbia have increased 25% to 50%.	(b) The amounts paid for commissions to brokers for the sale of houses in a large part of the District of Columbia have increased 25% to 50%.
(c) The activities and business policies of real estate brokers engaged in selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia have been actively and effectively restricted and dominated.	(c) The activities and business policies of real estate brokers engaged in selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia have been actively and effectively restricted and dominated.

From the foregoing it is apparent the causes of action and the issues of law and fact are identical.

Finality of prior judgment.

It is also a requisite that the judgment relied upon be a final one. Final judgment in Criminal Action No. 950-47 was entered June 4, 1948 (R. 312, 327). There was no appeal. It may be noted that the absence of a right to an appeal does not affect the application in a subsequent suit of the doctrine of *res judicata*. *Johnson Company* v. *Wharton*, 152 U. S. 252 (1894); *Washington & Georgetown R. Co.* v. *District of Columbia*, 146 U. S. 227 (1893); *Town of Elain* v. *Marshall*, 106 U. S. 578 (1883); *Griffin* v. *Long Island Ru.*, 102 N. Y. 449.[4]

In fact, the appellant may well have had a right of appeal from the trial court's ruling in Criminal Action No. 950-47. The United States Court of Appeals to which such an appeal could have been sought held that an appeal lay from a judgment of acquittal entered upon a motion under Federal Rules of Criminal Procedure 29, in a situation quite similar to that in Criminal Action No. 950-47. (*United States* v. *Waters*, 175 F. 2d 340, C. A. D. C. 1948).

The prior judgment was rendered in favor of these appellants or their privies.

At the close of the Government's case in Criminal Action No. 950-47, the trial judge granted the motions of Appellees National Association of Real Estate Boards and Washington Real Estate Board for a judgment of acquittal (R. 310). Final judgment in favor of these two Appellees was thereupon entered (R. 327). The other appellees were privies of the two acquitted Appellees, and their interests in this civil action are identical with one or the other of the two acquitted Appellees as the complaint herein reveals (R. 364-366).

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[4] This Court has held, in fact, that a reversal upon appeal does not prevent the application of the doctrine. *Reed* v. *Allen*, 286 U. S. 191 (1932); *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The Mitchell Case exception to the res judicata doctrine is not here applicable.

While a jury had been empaneled in Criminal Action No. 950-47 (R. 5), and heard all the evidence produced at the trial, the case never went to the jury, as the trial judge granted motions for judgment of acquittal made by the acquitted Appellees pursuant to *Federal Rule of Criminal Procedure* 29 (R. 310, 312). *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), therefore, is not in point. As discussed below, it is not controlling by analogy, as the ground upon which the judgment was rendered herein did not involve the question of burden of proof. Although the consideration could not have been controlling in view of the *Mitchell* decision's failure to overrule *Coffey* v. *United States*, *supra*, 116 U. S. 437 (1886), as discussed *supra*, the *Mitchell* decision did point out that in ordinary criminal actions the government often can not produce as much evidence as in a civil suit where a defendant can be made to testify. In the instant case this consideration is not present since both Appellees who were tried were corporations, and their officers and employees, including many of the other Appellees herein, were government witnesses (R. 29-294). A glance at this portion of the transcript of that proceeding will indicate that the government was able to try its case as fully as it could have been re-tried in this action. The government, in fact, stipulated that this action be tried on that transcript (R. 428).

That the consideration of ability to obtain evidence was not a controlling consideration in the *Mitchell* decision is also indicated by the fact that the rule of *res judicata* applies in favor of the Government in a civil action brought after an anti-trust criminal conviction. (*Local 167* v. *United States*, 291 U. S. 293, 1934). The *defendant* in a criminal proceeding is likewise more limited in his ability to obtain evidence and to present his case. Compare *Federal Rules of Civil Procedure* 33 and 36 with *Federal Rule*

of Criminal Procedure 16. The *Mitchell* decision may only be sustained on its major ground, that in a criminal acquittal based on a general *jury* verdict, it is impossible to determine what issues were determined. That situation is not, as is discussed *infra*, present in the instant case.

No analogy to the Mitchell Case is here applicable.

Mr. Justice Stephens in his exhaustive treatment of this phase of the law of *res judicata* in the concurring opinion in *United States* v. *United States Gypsum Co.*, *supra*, 51 F. Supp. 613 at 628-9 (D. C. D. C. 1943) states that certain directed verdicts might be analogized to the jury verdict in the *Mitchell* case situation. *Unless the record showed* the basis of the court's ruling, that opinion suggests the trial judge might have decided that all the evidence even if true could not in the mind of a reasonable man prove the crime *beyond a reasonable doubt*, although it could by a preponderance of the evidence. See *Curley* v. *United States*, 81 U. S. App. D. C. 389, 392-3, 160 F. 2d 229 (1947), *cert. denied* 331 U. S. 837 (1947).

The criminal action here, however, falls within the exception to the suggested analogy to the jury cases. The record in Criminal Action No. 950-47 shows that the trial judge did not grant the motions for judgments of acquittal on any basis of burden of proof. The court's oral opinion delivered from the bench (R. 306-310) indicates that he granted the motions because as charged in the indictment (R. 313-319), sought to be proved (R. 29-294) and argued by all parties upon the motions for judgment (R. 304-305) the government's theory of its case, *as a matter of law*, was unsound. Put another way, the Court held that all the facts charged did not amount to a violation of the Sherman Act. Nowhere in the trial judge's opinion from the bench

Nor has there ever been doubt that State court judgments are *res judicata* in a Federal court because of differences of procedure, rights to appeal or the like.

is there a mention of burden of proof. The following excerpt therefrom typifies the entire holding (R. 307-308):

> "The facts of the matter are that the defendants, who are real estate men, have entered into voluntary association for the purpose of bettering the conduct of their business, and after entering such associations they still continue their individual business in full competition with each other, and that the associations themselves, as associations, do no business whatever, but are simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold it in the proper way; and to create methods of preserving integrity amongst the members of the association.
>
> "In my view the charges of a real estate broker on account of his personal services are nothing more than charges for aids or facilities furnished to clients whereby their objects may be the more easily and readily accomplished. It is my view that charges or commissions of real estate brokers in the District of Columbia are based on personal services performed for clients, and their effect in the sale of real estate are not directly connected with or form a part of interstate commerce in the District of Columbia, because I feel that charges for services of this character and nature do not immediately touch upon or act upon nor do they directly affect the sale of real estate in the District of Columbia.
>
> "Of course indirectly and as an incident they may enhance the cost to the owner of real estate, or they may add to the price paid by the purchaser, but they are not, in my opinion, charges which are directly laid upon real estate itself. Rather are they charges for facilities given or provided to clients in the course of the sale of real estate.
>
> "Here in this case the conspiracy condemned by the statute is one whose direct and immediate effect is a restraint upon trade or commerce in the District of Columbia. As I say, charges for such facilities, in my opinion, are not restraints upon the trade or commerce, although, as I have indicated, the total cost of selling the real estate may be increased."

The trial judge relied upon *Hopkins* v. *United States;* 171 U. S. 578 (1898) and *State* v. *Duluth Board of Trade,* 107 Minn. 506 (1909) to hold *as a matter of law,* not upon any issue of degree of proof of facts, that the facts proved showed no conspiracy in restraint of trade under Section 3 of the Sherman Act (15 U. S. C. A. § 3). *Opinion,* Criminal Action No. 950-47 (R. 307-308). That issue of law is *identical* with the one presented by the complaint in this action and the Appellant and these Appellees are bound by the prior final determination of this issue of law. No exception to *res judicata* based on differences in proof can be applicable here as this issue is one of law and was decided without any dependence upon whether facts had been established beyond a reasonable doubt or merely by a preponderance of the evidence.

The District Court should have decided this identical issue the same way upon Appellees' motions for summary judgment, and should have so decided at the conclusion of the entire case. See Conclusion of Law No. 4 (R. 436). Appellees never abandoned the defense, see Findings of Fact No. 21-27 (R. 435).

Upon a question of *res judicata* neither the trial court nor an appellate court should consider whether or not, if the issue were before it for decision for the first time, it would have so decided. Even erroneous decisions are *res judicata;* any other rule would make the doctrine meaningless. *United States* v. *Oppenheimer,* 242 U. S. 85 (1916); *United States* v. *Moser,* 266 U. S. 236 (1924); *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938). As the Supreme Court said in the *Moser* case, 266 U. S. at 242:

> "But a *fact, question,* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

Appellant urges (Br. p. 69) that the ruling made by the criminal trial judge was not in issue. A comparison

of the indictment (R. 313-319) with the criminal trial court's opinion (R. 306-310) indicates the contrary. The trial judge ruled that what the Washington Board and its members were doing was not a direct restraint on commerce and did not violate the Sherman Act. That issue of law is present in the instant civil case, and if determined the same way again would dispose of the controversy in favor of appellees.

Appellant's argument, apparently, is that no issues of law can be raised by a motion under Federal Rule of Criminal Procedure 29. This would be a peculiar application of the rule. How else, might it be asked, could a legal issue be raised in a criminal trial unless it was clear on the face of the indictment? It has been held in the circuit from which this appeal is prosecuted, that Rule 29 may even raise the question of the sufficiency of the indictment. (*United States* v. *Waters*, 175 F. 2d 340 C. A. D. C., 1948).

There is no doubt that a trial judge's opinion (R. 306-310) may be examined to determine what issue was decided for the purposes of *res judicata*. Such has been the law in the circuit from which this appeal is prosecuted for many years. (*Nalle* v. *Oyster*, 36 App. D. C. 36, 1910, *affirmed with respect to the results of this holding Nalle* v. *Oyster*, 230 U. S. 165, 181, 1913.)

This Court to determine whether it has jurisdiction of a direct appeal under the Criminal Appeals Act (18 USCA § 682), in *United States* v. *Swift & Co.*, 318 U. S. 442 at 444 (1943), examined the opinion of the trial judge in the case below as reported in 46 F. Supp. 848 *in order to determine the issues ruled upon by the trial judge*. In *United States* v. *Wayne Pump Co.*, 317 U. S. 200 at 204-6 (1942), that Court likewise examined the opinion below, as reported in 44 F. Supp. 949, to determine the issues decided by the trial judge. See also *United States* v. *Maryland-Virginia Milk Producers Asso.*,

93 L. Ed. (Adv.) 15 (1948). If this Court can examine such an opinion, to discover the issues decided, the District Court and this Court can do so in the instant case.

Even were the opinion from the bench not part of the record in Criminal Action No. 950-47, the remainder of the record therein shows that no issue of reasonable doubt as to facts was the basis of the granting of the judgment of acquittal. Being aware of the concurring opinion in the *Gypsum* case, and having in mind that that opinion had stated that a directed verdict formed a basis of *res judicata* if in the nature of a ruling on a demurrer to the evidence, the acquitted Appellees made it clear to the trial judge that they were asking for such a ruling. Counsel for Appellee National Association of Real Estate Boards in making the motion, in which counsel for Appellant Washington Real Estate Board joined, stated (R. 304):

> "MR. WHITEFORD: If Your Honor pleases, in behalf of the National Association I make this motion for a judgment of acquittal.
>
> "The National Association of Real Estate Boards move for a judgment of acquittal on the ground that no substantial evidence has been adduced against the said defendant upon which a reasonable mind could infer guilt beyond a reasonable doubt.
>
> "The National Association makes the same motion on the ground there has been no showing of any violation of the Sherman Act.
>
> "In this last aspect, the motion is in the nature of a demurrer to the evidence.
>
> *"I may say at the outset that I file this motion in this form as seemingly required by the Circuit Court in the Gypsum case which is referred to, having in mind that a motion granted on those grounds would amount to res judicata so far as the equity suit is concerned."* (Emphasis added).

As the oral argument upon that motion progressed it became evident that the case was to turn upon a point of law. The government in closing its argument stated as much (R. 304-305):

"[MR. KRAMER] . In conclusion, if Your Honor please, I want to say once more with the exception of the intent and purpose of the Committee on Rates, Rules and Customs, with that exception I don't think that Brother Whiteford and I have any dispute about the facts in this case. *I think Your Honor is presented with a question of law which is pretty neatly tied up with the considerations and that is:* Is an agreement by each member of an association in the District of Columbia with a third party to abide by whatever rates of commissions that association establishes an agreement, a price fixing agreement in restrict of trade? We say it is and we say it is for that very same reason that the Court said it was in the Gypsum case." (Emphasis added).

The granting of the motions alone, after those two statements, shows from the record that the trial court's ruling was in the nature of a ruling upon demurrers to the evidence so that there is no question of reasonable doubt in the record. Here is a case in which it is possible to tell from the record, either with or without the trial judge's opinion, that the issue of burden of proof beyond a reasonable doubt was not the basis of the judgment, so that the one exception to *res judicata* is not applicable.

Appellant, however, at page 66 of its Brief, urges that since both a civil and a criminal remedy are provided by sections 1-4 of the Sherman Act (15 USCA § 1-4) Congress intended the government in a civil action to proceed even if the criminal action was lost. This argument entirely begs the question, since Congress obviously only intended the government to have concurrent remedies *if there had been a violation of the Sherman Act.* See *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912). But where there is no violation, remedies become immaterial. That the Appellant might have obtained both civil and criminal relief had it been determined that there had been a violation, does not support the proposition that Appellant should be given an opportunity to re-litigate here their entire cause of action.

What appellant really fears is that it might lose in this situation a peculiar and unfair advantage which it usually enjoys when it first prosecutes its criminal action and then, later, turns to the companion civil action. Usually, the criminal action will go to the jury. The Government then stands much to gain and little to lose. If it gains a jury verdict, it pleads it as *res judicata* in the civil action and obtains an automatic judgment without re-trial. (*Local 167* v. *United States, supra,* 291 U. S. 293, 1934.) But, if it should lose, it may have another chance to prove its case relying on *Helvering* v. *Mitchell,* 303 U. S. 391, (1938).

Only the accident that most acquittals are by general jury verdict, so that there is a *possibility* that a different degree of proof was used, prevents application of the rule of mutuality inherent in the doctrine of *res judicata. Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 127 (1912); *Ingersoll* v. *Coram,* 211 U. S. 335, 364 (1908); *Litchfield* v. *Goodnow,* 123 U. S. 549 (1887); *Davis* v. *First National Bank,* 139 Tex. 36, 161 S. W. 2d 467, 144 ALR 1 (1942). When a court can, from the record in the prior case, eliminate that bare possibility that the prior acquittal was based on reasonable doubt although the facts were established by a preponderance of the evidence, considerations of fair play demand that it do so.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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